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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1901.

No. [illegible] 89.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

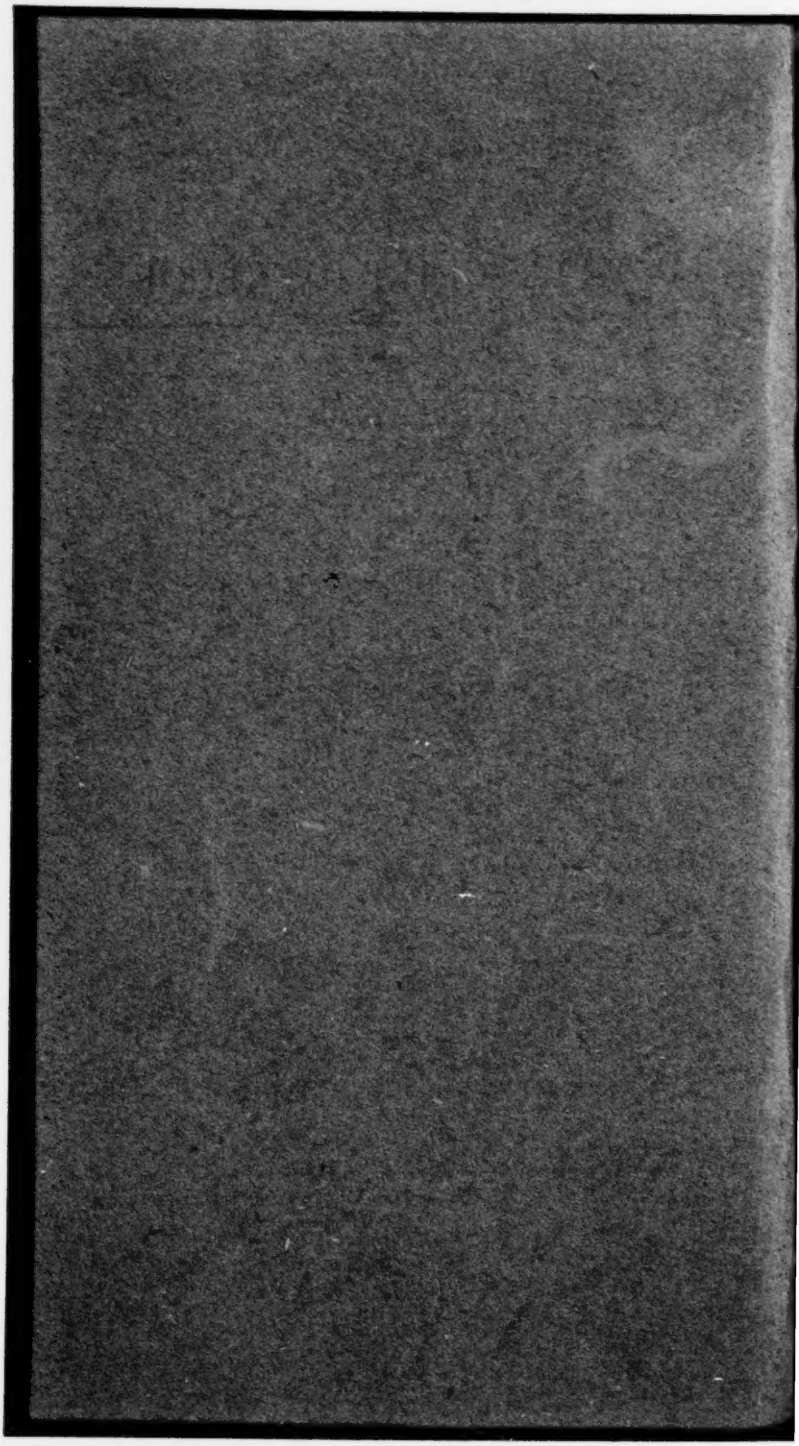
vs.

THE PENNSYLVANIA RAILROAD COMPANY AND THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED [illegible], 1901.

(19,018.)



(19,018.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 367.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE PENNSYLVANIA RAILROAD COMPANY AND THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
against
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants.
} Bill in Equity.

Bill of Complaint.

(Filed November 22, 1902.)

To the honorable the judges of the circuit court of the United States for the district of New Jersey:

The Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, and a citizen and resident of said State, having its principal place of business in the State of New York and in the southern district thereof, brings this its bill of complaint against the Pennsylvania Railroad Company, a corporation organized under the laws of the State of Pennsylvania and a citizen and resident of that State, having its principal place of business in the city of Philadelphia, but doing business in the State of New Jersey, and the United New Jersey Railroad and Canal Company, a corporation organized under the laws of the State of New Jersey and a citizen and resident of that State, and says:

1. That this case is one wholly arising between citizens of different States, and that the subject matter thereof and the amount in controversy is of the value of more than two thousand dollars, exclusive of interest and costs, and is, also, one arising under the Constitution and laws of the United States, in that your orator The Western Union Telegraph Company, asserts rights and privileges under acts of Congress and the Constitution and laws of the United States against said defendants.

2. That your orator, The Western Union Telegraph Company, is a telegraph company and a corporation duly organized and existiug under an act of the legislature of the State of New York, entitled "An act to provide for the incorporating and regulation of telegraph companies," passed on the 12th day of April, 1848.

2 3. That the United New Jersey Railroad & Canal Company is a corporation duly organized and existing under the laws of the State of New Jersey, and is the owner of a line of railroad extending from Jersey City in the State of New Jersey to the Delaware river at the city of Trenton in said State, with the following branches:

One extending from Princeton Junction in the county of Mercer to the borough of Princeton in said county.

One extending from the city of Rahway in the county of Union to the city of Perth Amboy in the county of Middlesex.

One extending from South Amboy in the county of Middlesex to the city of Camden in the county of Camden.

One extending from the main line in the town of Harrison, Hudson county, to Centre street, Newark, Essex county.

One extending from Monmouth Junction, Middlesex county, to the southerly terminus of the Rocky Hill railroad, near Kingston, Somerset county.

One extending from Millham Junction on the main line in Hamilton township in connection with Belvidere connection in Trenton city.

One extending from junction with Belvidere connection, and Belvidere Delaware R. R. in Trenton city to connection with Bordentown branch.

One extending from junction with the main line in connection with Belvidere and Delaware railroad and Bordentown connection.

One extending from the main line at Monmouth Junction to Jamesburg, Middlesex county.

One extending from Camden & Amboy division at Bordentown, Burlington county, to Trenton, Mercer county.

One extending from the main line in Florence, to Delaware river, Florence foundry, Burlington county, and said railways are within the State of New Jersey and within this district.

4. That the Pennsylvania Railroad Company is a railroad corporation organized and existing under the laws of the State of Pennsylvania, and is the owner of a line of railroad extending from the city of Philadelphia to the city of Pittsburg, in said State, and that within the State of New Jersey the said Pennsylvania Railroad Company is in possession and control of and operating the lines of railroad hereinbefore described as belonging to the United New Jersey Railroad & Canal Company, under a lease or leases for a period of 999 years from the 1st day of July, 1871.

3 That the railroads of the United New Jersey Railroad and Canal Company hereinbefore described were authorized and constructed and are now maintained, operated and controlled under and by virtue of certain public acts of the legislature of the State of New Jersey, as follows:

(1.) An act entitled "An act to incorporate the Delaware and Raritan Canal Company," passed February 4, 1830.

(2.) An act entitled "An act to incorporate the Camden and Amboy Railroad and Transportation Company," passed February 4, 1830.

(3.) An act entitled "An act to incorporate 'The New Jersey Railroad and Transportation Company,'" passed March 7, 1832.

(4.) An act entitled "An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies," passed February 15, 1831.

(5.) An act entitled "A further supplement to the act entitled 'An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies,'" passed March 15, 1837.

(6.) An act entitled "An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia," approved February 27, 1867.

(7.) An act entitled "An act to enable the United Railway and Canal Companies to consolidate their stock and to consolidate or connect with other companies," approved March 17, 1870.

(8.) An act entitled "An act to amend an act entitled 'An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia,'" approved March 14, 1872.

(9.) An act entitled "An act to validate and confirm a certain lease and contract between the companies now known as the 'United New Jersey Railroad and Canal Company' and 'The Pennsylvania Railroad Company,'" approved March 27, 1873.

And your orator further shows that in and by said last-mentioned acts and the several supplements thereto and acts amendatory thereof, and the general public laws of the State of New Jersey, the said several railroads of the said defendants hereinbefore described were created and made and now are public highways, and as such subject to occupation and use by telegraph companies, and by your orator, under the provisions and conditions of the act of Congress of July 24, 1866, as hereinafter fully set forth.

4 5. That your orator was thus organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of telegraph lines in the State of New York and adjoining States, and has continuously, since that time, been engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extends through all the States and Territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico and through the said land-lines of Mexico with the telegraph lines of the Central and South American republics and by means of submarine cables with the telegraph systems of foreign countries; that at the present time its said system of telegraph lines operated and controlled by it, as aforesaid, comprises, over 192,000 miles of poles and cables, and over 900,000 miles of wire; that upon the said system of telegraph lines your orator has over 23,000 offices, and transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for your orator and exclusive also of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator, which is sit-

uated in the city of New York, and the said lines radiate therefrom to all the important cities and commercial centres and to many thousand towns and villages in the United States and in North America and through the ocean cables and land-lines above described to all the important commercial centres of this continent and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important part of said system of your orator and connected with its main office as aforesaid in the city of New York and connecting with other lines of telegraph leading to the important commercial centres of the West and Southwest, are lines of telegraph over and along the lines of railway of the defendants connecting Jersey City with Philadelphia, and there connecting with lines reaching to Pittsburg and the West and the city of Washington and the South, and through those lines to connection with lines to Mexico and Central and South American countries.

5 6. That the said lines of telegraph along the said railways of the defendants in the State of New Jersey were originally constructed and owned by the predecessor in title to your orator—the American Telegraph Company—a corporation of the State of New Jersey, with the consent of or under contracts and arrangements with the railway company then owning the said line of railway, and that the said lines of telegraph were originally constructed more than forty years ago, and that, since the 20th day of September, 1881, the said telegraph lines over and along the right of way of said railroads have been maintained and operated and compensation h-s been made therefor by your orator under the provisions of a contract between the defendant the Pennsylvania Railroad Company and the Western Union Telegraph Company, a copy of which contract is hereto attached marked "Exhibit 1," and made a part of this bill.

7. That since the making of said contract "Exhibit 1," hereto attached, your orator has, at its own cost and expense, reconstructed all the lines originally constructed by said American Telegraph Company and constructed, at its own cost and expense, additional lines and strung additional wires, and is now the owner of all the lines of telegraph existing over and along and upon the right of way of said defendant railway companies, save and except a line of telegraph belonging to said defendant companies, and used by the defendants for railway purposes in the operation of their railroads. That the said lines of telegraph of your orator have been continuously maintained and operated along and upon the said railways with the consent of the said railway companies, under the contract Exhibit 1, since the 20th of September, 1881; that since the 20th of September, 1901, with the consent of the said railway companies, payments have been made by your orator to the said railway companies, in accordance with the provisions of the said contract, and that said payments were received by the said Pennsylvania Railroad Company, as due under and by virtue of the terms of said contract Exhibit 1, as shown by communication from M. T. Wilbur,

treasurer of your orator, to the comptroller of the Pennsylvania Railroad Company, defendant herein, and by the receipts of said Pennsylvania Railroad Company hereto attached and made part hereof as Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19. That the payments shown in Exhibits 16, 17, 18 and 19 were made by your orator and received by the said Pennsylvania Railroad Company after the giving and receipt of the notice of May 14, 1902 next, hereinafter stated as Exhibit 20.

6 8. That on or about the 15th of May, 1902, the defendant The Pennsylvania Railroad Company, acting for and representing the defendants, caused to be transmitted to your orator a notice, dated May 14, 1902, requiring the removal of all the poles, wires and telegraph property of your orator upon the right of way and property of the said lines of railway within six months from the first day of June, 1902, and in default of compliance with the requirements of said notice that the said railroad company would cause said poles and other property to be removed at the expenses of your orator, a copy of said notice being hereto attached, made part of this bill, and marked "Exhibit 20."

9. That your orator is advised and so avers that by reason of the facts in this bill of complaint set forth, and by reason of the receipt of said payments, as shown in said Exhibits 2 to 19, both inclusive, the said contract of September 20, 1881 (Exhibit 1), was continued in force, and the said contract and all of its terms and provisions are now in full force and effect, and the said defendants have no right, notwithstanding the said notice of date May 14th, 1902, to remove or cause to be removed from the line of the defendants' said railways the poles, wires and telegraph property of your orator at the end of six months from the 1st day of June, 1902.

10. The said lines of telegraph owned by your orator have been maintained and operated along and over said lines of railway of the defendants at all times prior hereto, and at the present time the said lines are so maintained and operated as not to interfere with the ordinary use and operation of said railway and the ordinary travel thereon, being situated near the outer limits of the right of way of said railway and in such manner as not to obstruct, interfere with, delay or endanger the operation of said railways or with the ordinary travel upon said railways, and that as now located, and maintained and operated, said lines can continued to be so maintained and operated as not to interfere with the future operation and maintenance of said railways or the ordinary travel upon said railways, subject only to such slight changes in the location of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way or the shifting of tracks already existing upon said railways, necessitating the removal at some point or points of some of the structures connected with said telegraph lines, which removal or removals your orator is ready at all times to make.

(11.) Your orator further says that the connections of all
7 parts of the system of telegraph lines, owned and operated by your orator at Jersey City, are by means of cables laid with

the consent of the defendants and pursuant to law and acts of Congress in that behalf provided under the waters of the Hudson river and navigable rivers of the United States and landing upon the rights of way and property of said railway companies used in connection with the operation of their said railroads.

(12.) Your orator says further that, upon the receipt of the said notice, Exhibit 20, attached hereto, through its president, it communicated with the said defendant, The Pennsylvania Railroad Company, as shown by letter of May 20th, 1902, copy of which is hereto attached, made part hereof, marked "Exhibit 21."

That in reply to your orator's communication, Exhibit 21, your orator received a communication from the said defendant Pennsylvania Railroad Company, dated the 21st of May, 1902, copy of which is hereto attached, made part hereof, and marked "Exhibit 22."

That, under date of June 26th, 1902, your orator caused a reply to be transmitted to the said communication, which reply is marked Exhibit 23, asking a conference of the said defendant Pennsylvania Railroad Company for the purpose of adjusting and agreeing upon the compensation to which the defendant's company would be entitled for the use by your orator for its said lines of telegraph of your orator over and along and upon the right of way of the said railroad companies, a copy of which communication is hereto attached, made part hereof, and marked "Exhibit 23."

That in reply to said communication, Exhibit 23, under date of July 5, 1902, your orator received a communication signed by the president of said defendant companies, a copy of which is hereto attached, made part hereof and marked "Exhibit 24."

That said defendant Pennsylvania Railroad Company has refused to negotiate with your orator for the continued use and occupation of said railroads, and has refused to treat with your orator as to the compensation to be paid by your orator for telegraph uses under and pursuant to the said acts of Congress.

(13.) Your orator further shows that the defendant The Pennsylvania Railroad Company in giving to your orator the said notice to remove its poles, wires and telegraph fixtures from the premises of the said defendants and in refusing to negotiate for the use of its said railways has not been impelled thereto by any compulsion or necessity to use the space occupied by your orator's said telegraph
8 lines for railroad purposes, for as your orator has fully shown and set forth and here alleges said telegraph lines do not and will not interfere with the ordinary travel and use of said railways, but your orator is advised and avers the fact to be that the purpose of the said defendants is, upon the removal of said telegraph lines of your orator, to place or allow to be placed upon said lines of railway telegraph lines to be owned or used by another telegraph company in the same or substantially the same location now occupied by your orator's lines, and to be used in the same or substantially the same manner as your orator now uses its said lines of telegraph on said railroads.

14. Your orator says that the Congress of the United States passed an act, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes."

That the first section of said act is as follows:

"Any telegraph company now organized or which may hereafter be organized under the laws of any State shall have the right to construct, maintain and operate telegraph lines through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

The second section of said act is as follows:

"That telegraphic communication between the several departments of the Government and the irofficers and agents, shall, in their transmission over the lines of any such telegraph companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

Section 3 of said act is as follows:

That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person; provided, however, that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other
9 purposes, purchase all the telegraph lines, property and effects of any or all of said companies, at an appraised value to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

Section 4 of said act is as follows:

That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

15. Your orator further says that, complying with the provisions of the said act of Congress, it did, on or about the 8th day of June, 1867, duly file its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of said act, (a copy of which is hereto annexed, marked "Exhibit 25," and made part of this bill of complaint), and thereupon your orator became entitled to all the rights and privileges conferred by said act and burdened with all the obligations imposed thereby, and that it has continuously, since the filing of its said written acceptance, as aforesaid, fully performed, and at the present time is fully performing, all the obligations and requirements of said act, and has carried upon its lines of telegraph, messages for the Government of the

United States and for the several departments thereof, giving the same priority over all other business and at rates annually fixed by the Postmaster-General, which rates have been much less than the ordinary reasonable rates charged to and paid by individuals and the public for the transmission of like messages and communications.

16. Your orator further says that, by an act of Congress approved June 10, 1872, entitled "An act making appropriations for sundry civil expenses of the Government, for the fiscal year ending June 30, 1873, and for other purposes," the following was among other things enacted:

"Provided that the Secretary of War be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agricultural and commercial interests; and provided that no part of this appropriation nor of any appropriation for the several departments of the Government shall be paid to any telegraph company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents or employés, under the provisions of the second section of chapter 230 of the statutes of the United States for the year 1866, and at rates of compensation therefor to be established by the Postmaster-General; provided also that, whenever any telegraph company shall have filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July 24, 1866, entitled 'An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' if such company, its agents or employés shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act or by the joint resolution approved the 9th day of February, 1870, 'to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of the approach and force of storms,' such telegraph company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law in any district court of the United States."

17. Your orator avers that, in compliance with the said last-named act, it has carried for the Government of the United States over lines situated over and along the lines of railway of the defendant companies, and upon its other telegraph lines connected therewith, at all times since the passage of said act, at rates far below the reasonable rates charged to and paid by individuals or to the public for similar services, communications relating to the meteorological and signal service from the various stations maintained by the Government of the United States throughout the interior of the continent and along the seaboard, such communications being especially difficult of transmission from the fact that they are for the most part

written in cipher, for the purpose of saving expense to the Government of the United States and many words are indicated by a single arbitrary word or character; but that, nevertheless, even at the reduced rates at which your orator carries such communications the charges therefor amount to many thousands of dollars annually.

11 18. Your orator further says that the Congress of the United States, by an act approved June 18, 1872, enacted that all railroads or parts of railroads which were then or might thereafter be in operation, and all letter-carriers' routes established in any city or town for the collection and delivery of mail matter should be post routes, and thereafter by an act approved March 1, 1884, all public roads and highways, while kept up and maintained as such, were declared to be post roads.

19. That the said acts of Congress apply to the railroads of the defendants herein mentioned and described, and the said railroads are post roads of the United States duly established by act of Congress in that behalf provided, and are also public roads and highways under said acts of Congress and the said laws of New Jersey relating to the defendant railway companies. That your orator, The Western Union Telegraph Company, having duly filed its written acceptance with the Postmaster General of the restrictions and obligations of the said act of July 24, 1866, and fully complied with all of the restrictions, obligations, duties and requirements of said acts of Congress above mentioned, has the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendants herein mentioned and described so as not to interfere with the ordinary travel thereon, and the plaintiff is ready and willing and hereby offers to make to the defendants, and each of them, a just compensation for the use by your orator of the roadway or right of way of the defendant companies for your orator's telegraph lines under and pursuant to said acts of Congress, over and along the said railroads of the defendants.

20. That the said grant by the United States in and by the aforesaid acts of Congress of the right to construct, operate and maintain the telegraph lines of the plaintiff on the railroads of the defendants was a grant made upon a full, valuable and continuing consideration paid and rendered by your orator to the United States, which consideration was the agreement of the plaintiff evidenced by your orator's written acceptance, of the act of July 24, 1866, duly filed with the Postmaster General, of the restrictions and obligation- of the said act, as hereinbefore set forth, and the full and continuous performance by your orator of all of the obligations and duties created and imposed by said acts of Congress. That your orator has since said acceptance of said act performed all the obligations and duties required by said acts and by law, and your orator has ever since the date of filing of said acceptance given, and is

12 still giving, to the United States, and to the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of your orator,

situated over and along the railroads of the defendants, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by your orator for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered by your orator to the Government. Your orator has accepted, among others, the provisions of the said act of Congress of July 24, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said act of Congress. Your orator states that by reason of the premises, its acceptance of the said act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by your orator of the requirements of the said acts of Congress, the right granted by the said act of July 24, 1866, to your orator to construct, maintain and operate its lines of telegraph over and along the railroads of the said defendants became vested, and the said grant is in full force and effect, and your orator avers that its right to construct, maintain and operate its said lines of telegraph over and along the railroads, and right of way of the defendant companies is complete, your orator being under an obligation or liability only to make fair and reasonable compensation to the defendants for the value of the use by your orator of the said right of way or railways of the defendants in the manner and under the restrictions of the said acts of Congress.

21. That the plaintiff, on June 8, 1867, duly accepted as aforesaid the said act of July 24, 1866, and acting thereon immediately entered upon the performance and has ever since continued to perform all of its duties and obligations thereunder to the United States and the public, and the plaintiff was in possession and enjoyment of its telegraph lines over and along said defendants' railroads herein mentioned and described and of the rights granted and conferred upon it by said act of July 24, 1866, long before and at the time the Pennsylvania Railroad Company became the lessee of said railroads or acquired any interest therein or use or control thereof, of all of which the defendants then and there had notice, and the plaintiff is advised and now avers that the rights of the defendants in said railroads are subject to the rights of the plaintiffs under said acts of Congress and the laws of New Jersey and in particular the
13 plaintiff avers that the said lease of said railroads to The Pennsylvania Railroad Company, defendant herein, and any rights acquired by said Pennsylvania Railroad Company in or to said railroads or the use, possession or control thereof are subject to the rights of the plaintiff granted and conferred upon it by the said act of Congress of July 24, 1866, and acquired by the plaintiff by its acceptance of said act and its performance of all the obligations and requirements of said acts of Congress.

22. Your orator further says that prior to the expiration of the period named in said contract of Sept. 20, 1881, your orator entered into negotiations with the officers of said Pennsylvania Railroad

Company respecting an arrangement as to the continuance of the maintenance and operation of the telegraph lines of your orator over and along the lines of the railways controlled and operated by the said railroad company, and that said negotiations proceeded so far that substantially all the terms and conditions of a contract were agreed upon and reduced to writing, there remaining only a few details to be ascertained in order to embody in the said contract a complete agreement respecting the continued maintenance and operation of your orator's said telegraph lines; and that your orator, relying upon the promises and representations of said defendant that such an arrangement would be made, took no further steps to enforce its right to construct, maintain and operate its said lines over and along the railways of defendant until the receipt of said notice from the said defendant The Pennsylvania Railroad Company, dated the 14th day of May, 1902 (Exhibit 20) hereto attached and hereinbefore set forth; that following the receipt of said notice your orator sought to treat with the said defendant The Pennsylvania Railroad Company as to the amount of compensation to be paid by your orator for the use of the right of way or roadway of the defendants whereon to construct, maintain and operate the telegraph lines of your orator over and along the said right of way of said railroads, whereby your orator's lines of telegraph might connect with the lines beyond the defendant's lines of railway and form continuous lines for the transmission of intelligence to other States and to foreign countries for the public and the Government of the United States; but the said defendant refused wholly to treat with your orator as to the amount of compensation to be thus paid.

23. Your orator is informed and believes that the said defendants will insist that your orator has no right or privilege of con-
14 structing, maintaining and operating telegraph lines over and along the defendants' lines of railway, except as such right may be conferred upon your orator by a contract with or by the permission of the defendants; that said defendants insist that the said acts of Congress, although accepted and performed by your orator as herein shown, confer no right or privilege upon your orator to construct, maintain and operate its telegraph lines over and along the defendants' said railways, except as the said defendants may consent thereto and upon the terms and conditions fixed by the said defendants, and that the said contract of September 20, 1881, fixed for the period named in the said contract the terms and conditions upon which alone your orator had the right to construct, maintain and operate telegraph lines over and along the said defendants' railways, and that upon the termination of the period named in said contract the right of your orator to construct, maintain, and operate its lines of telegraph over and along the defendants' said lines of railway wholly ceased and determined; and that the sole right of your orator in or to said telegraph lines is the right of removal of the poles, wires and fixtures connected therewith, according to the terms and conditions prescribed in the said contract of September 20, 1881; but your orator insists that in and by the said acts of Congress here-

-nbefore set forth their acceptance and performance by your orator of the duties and obligations created and imposed by said acts, as in this bill of complaint set forth, there was granted to your orator and your orator has the right to construct, maintain and operate its telegraph lines over and along the defendants' said lines of railway, as in said acts provided, subject only to the condition that your orator should pay to the said defendants a reasonable compensation for the use of the right of way or roadway of the defendants occupied by your orator's telegraph lines. Your orator shows that the right thus conferred in and by the said acts of Congress upon your orator, your orator has never waived nor relinquished and that in accepting the provisions of the said acts of Congress it entered into obligations and undertakings with the Government of the United States which would effectually preclude it from waiving or relinquishing, and your orator avers that it has never waived or undertaken to waive or relinquish the same.

24. Your orator alleges that said defendants deny and repudiate any right on the part of your orator, even upon tender or payment to the defendants of just compensation therefor, to construct or to continue to maintain and operate its telegraph lines or any telegraph lines over and along the defendants' said lines of railway, notwithstanding the provisions and conditions of the said act of Congress of July 24, 1866, and the laws of the State of New Jersey above mentioned. Your orator avers, upon ascertaining the fact that the said defendant, The Pennsylvania Railroad Company, was wholly unwilling to treat with your orator as to the amount of such compensation and wholly denied as aforesaid the rights of your orator, that thereupon your orator, in aid of its rights and equities as shown in this bill of complaint, duly filed its petition and brought its action in this court, upon the law side thereof, against the defendants in this suit, to have ascertained and determined the amount of compensation to which the defendants herein would be entitled from your orator, for the use of the right of way of the defendants' said railroads in the State of New Jersey, whereon your orator might construct, maintain and operate its said lines of telegraph, and that upon the payment of said sum thus ascertained your orator would have as against the defendants the right to construct, maintain and operate telegraph lines along and upon the right of way or roadway of the railways of the defendants herein, but subject always to the conditions named in the said act of Congress of July 24, 1866, that the same should not interfere with the ordinary travel upon said railways, nor with the operation, use, possession and control of said railways by the said defendant railway companies. That a copy of your orator's petition in the said action as filed is hereto attached, marked "Exhibit 26" and made part of this your orator's bill of complaint; that in the said action thus brought summons has been issued and service made or will speedily be made upon the defendants herein, and your orator expects in due time as soon as the said action can be heard, that the court will order and adjudge the amount of compensation upon the

payment of which as thus adjudged by the said court, your orator will be entitled to continue to construct and to maintain and operate telegraph lines along and over the said lines of railway, owned and controlled by the said railway companies under and subject to the conditions and provisions of said act of Congress of July 24, 1866.

25. Your orator further says that it stands ready and is able and willing and hereby offers to pay to the said defendant railway companies such just and reasonable compensation as may be decreed by this court under this its bill of complaint or in the said action filed on the law side of this court, for the use of the right of way of the defendants' railroads on which to construct, maintain,
16 and operate your orator's telegraph lines over and along the right of way of the said railway companies, as provided in the aforesaid act of Congress of July 24, 1866, and under the terms, conditions, and restrictions thereof, and is willing and hereby offers to furnish such security for the payment of such sum as may be decreed by this court in this cause or that may be adjudged in the said action upon the law side of this court, or as the court may otherwise ascertain and determine and herewith tenders such security upon such terms and conditions as this court may fix.

26. Your orator says further that said lines constitute some of the main lines of communication for the transmission of telegraphic messages between the city of New York and foreign countries and the larger cities of the West and Southwest and that the defendant The Pennsylvania Railroad Company is threatening at the termination of the six months named in its notice, dated May 14, 1902, to wit, on the first day of December, 1902, to sever the lines of telegraph from their connection with the other lines of telegraph owned and operated by your orator, and thus cut off and destroy the same for the purposes of telegraphic communication and thereby deprive a large number of the public in the United States and foreign countries of the means of telegraphic communication now enjoyed by them, and also to cripple and deprive the several departments of the Government of the United States of telegraphic facilities on said lines of railway now enjoyed by them, and the said defendants unless restrained by this order of the court will carry such threats into execution.

27. Your orator further says that the cutting down of the said poles and the removal of the said wires and the severing of the connections with the said cables, as threatened by the defendant, The Pennsylvania Railroad Company, would inflict irreparable injury upon your orator and would practically destroy the entire value of all of the telegraphic properties of your orator now constructed, maintained and operated along and upon the right of way of the defendant railway companies as hereinbefore set forth; that the value of said poles when taken down for removal would be but a small portion of their value as working parts of your orator's telegraphic system, and that the wires thereon would be of comparatively small value when taken down and removed from connection with the said poles; that said properties are of such character that

the act of removal would largely destroy their value, and that if the said Pennsylvania Railroad Company, defendant herein, is
17 allowed to carry out its threats as aforesaid, it will be the practical destruction of so much of your orator's telegraphic system, comprising a large number of wires upon which are now being carried most important business for the public and for the Government of the United States; that said telegraph lines along and upon the right of way of the railways of the said defendant company do not interfere with the ordinary operation of said railways, and wi l not so interfere, and the continuance of the said lines there will be of but slight detriment, in any aspect of the situation, to the said defendants or either of them.

28. Your orator further avers that there is no other company equipped with the facilities to transmit for the public the business which is now being transmitted over the lines situated along and over the right of way of the defendant railway companies, and that if the public and the Government of the United States were deprived of the facilities afforded by the said lines along and over the defendants' railways, a long period of time must elapse before facilities to take their place can be furnished by your orator, or by any other company engaged in the business of telegraphing.

29. Your orator says further that it is diligently prosecuting said action on the law side of this court for the ascertainment of the amount of compensation to the said railway companies defendant herein for the right to the use of said railroads to maintain and operate its telegraph line along and over the lines of said railways as prescribed in said act of Congress of July 24th, 1866; and that it will continue to prosecute the same to a final determination as rapidly as the business in said court will permit the said cause to be heard and determined and without any unnecessary delay.

30. Your orator avers that such forcible removal of your orator's telegraph lines by the defendant as threatened is contrary to the intent and purposes of said acts of Congress, and would work great, irreparable and lasting damage and injury to your orator, to the public and to the Government of the United States and which could not be compensated for in money; and that the value of the use of the right of way of the defendants by your orator is of comparatively small value, works no substantial damage or injury to the defendants and can be fully compensated for in money.

31. Forasmuch, therefore, as your orator can have no adequate relief except in this court and to the end that the defendants may, if they can, show why your orator should not have the relief
18 hereby prayed make full disclosure and discovery of all matters aforesaid according to the best of their knowledge and belief and full, true and perfect answer make to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived, your orator prays that this court ascertain, order, adjudge and decree the amount of compensation to be paid by your orator to the defendants, as their rights may severally appear, for the construction, maintenance and operation of your orator's

telegraph lines over and along the right of way of the defendants' said railroads under the terms, provisions and restrictions of said acts of Congress hereinbefore mentioned, or if this court shall order and determine, that the amount of such compensation to the defendants shall be such amount as shall be determined or adjudged in the said action at law, that upon due payment of such compensation by your orator to the defendants, this court will order, adjudge and decree that your orator is entitled to a perpetual injunction against the defendants herein and each of them, restraining them and each of them from in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendants' under and subject to the provisions and restrictions of the said act of Congress of July 24th, 1866, and meanwhile and until the final decree of this court that a temporary injunction be issued against the defendants prohibiting and restraining them and each of them from in any manner interfering with the use and operation of the telegraph lines of your orator upon the said roadway and right of way of the defendants pending the determination of the said action at law, or until the further order of this court in the premises. And for such other and further relief as the case may require and to your honors may seem just.

May it please your honors to grant unto your orator not only the writ of subpœna of the United States of America to be directed to the defendants The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company commanding them and each of them by a certain day and under a certain penalty to be and appear before your honors in this honorable court then and there to answer all and singular the premises and to stand and abide and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience; but also the United States writ of injunction, restraining them and each of them, their servants, agents and employees as aforesaid.

19 This bill of complaint is filed under the corporate seal of the complainant.

ROBERT C. CLOWRY, *President.*

[SEAL.]

Attest: A. R. BREWER, *Secretary.*

RUSH TAGGART,
Solicitors for Complainant.
JOHN F. DILLON,
RICHARD VLIET LINDABURY,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Robert C. Clowry, being duly sworn, says he is president of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he

has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ROBERT C. CLOWRY.

Sworn to before me this 15th day of November, 1902.

CHARLOTTE A. VAN BRUNT,

[L. S.] *Notary Public, Kings County, No. 4.*

Certificate filed in New York county.

EXHIBIT 1.

This agreement, made the twentieth day of September, anno Domini one thousand eight hundred and eighty-one (1881), between the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, hereinafter for brevity designated as the railroad company, and the Western Union Telegraph Company, a corporation of the State of New York, hereinafter for brevity designated as the telegraph company, witnesseth:

20 First. Said railroad company hereby grants, to the extent of its corporate power so to do, to the said telegraph company, a right to place, maintain and use upon the line of the right of way of the Pennsylvania railroad, and of the railroads owned, operated, or leased by it, or in which it is otherwise interested, as enumerated in the schedule hereto attached, marked "A," and made part of this agreement, a single line of telegraph poles, except where two are hereinafter authorized, with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company, or such other officer as the railroad company may designate for that purpose: *Provided*, That the location of any of the telegraph company's poles shall, from time to time, be changed from one point to another on the railroad right of way at the expense of the telegraph company, in such manner as the general manager, or other proper officer of the railroad company may direct, so as not to interfere with the operations of the railroad: *Provided, however*, That the telegraph company shall have the right to maintain two lines of poles and such number of wires as it may deem necessary, on the south side of the main line of the railroad company's railroad between Jersey City and West Philadelphia, it being understood that the railroad company may require and permit the telegraph company either to put its wires under the railroad right of way, or to remove them from said right of way through the various cities, towns or villages, or any of them, between West Philadelphia and Jersey City, including both of those cities, the telegraph company reserving the right to elect whether it shall put its wires under

the railroad right of way or transfer them to other routes. The telegraph company shall have the right to maintain, renew and repair its underground line now running through the property of the railroad company in Jersey City. And should additional corporate action upon the part of any of the corporations controlling the roads named in "Schedule A," hereto attached, be necessary to cover the lines therein named, the railroad company will also endeavor to procure such corporate action upon the part of such corporations.

Second. Said railroad company also grants to said telegraph company the right to lay down and maintain submarine cables, and to connect the same on the shores of any stream with the land poles or wires of the telegraph company, on the rights of way and
21 grounds of the railroad company, in such locality, and in such manner, under the direction of the general manager aforesaid, or such other officer as the railroad company may designate for that purpose, as shall not interfere with the operations of the railroad.

Third. Said railroad company reserves to itself the option of determining whether the telegraph company may place a wire or wires, in addition to those provided for in the seventh clause hereof, upon the poles of the railroad company, upon any or all of the lines embraced in said schedule, the telegraph company agreeing that if such privileges be granted to and availed of by it, it will pay to the railroad company for the same, four dollars per mile per annum for each wire placed in pursuance thereof.

Fourth. The railroad company agrees to transport to and from regular stations, free of charge, over said lines of railroad embraced in this contract, the officers and employees of the telegraph company when engaged in building and repairing, equipping, and operating the telegraph lines and wires hereby authorized upon said railroads, and also to transport free of charge to regular stations over said railroads the material to be used in the building or repairing, equipping or operating of said telegraph lines and wires herein authorized to be constructed, maintained, or operated on the railroads named in Schedule A; the telegraph company hereby agreeing that it will hold harmless and indemnify the said railroad company against all responsibility for damages, costs, or expenses that may be incurred or recovered for any injury by accident or otherwise to any person or property transported free under the terms of this agreement.

Fifth. The railroad company agrees that it will not hereafter grant the right to any other party or telegraph company, to erect, maintain, or use poles or wires upon the right of way, or the buildings, bridges, or other structures or fixtures connected with the right of way of any of the railroads embraced in this agreement, unless such other party or telegraph company shall pay annually for such right in money an amount equal to the total annual money compensation herein agreed to be paid by the telegraph company, to wit:

If under the terms of this agreement, the railroad company shall hereafter grant to any other party or telegraph company the right

to erect poles with wires thereon, the railroad company shall have the right, anything in this agreement contained to the contrary notwithstanding, to make the same terms, or terms which in
22 the opinion of the railroad company's board of directors will be equally favorable, with such party or telegraph company, as to receiving and transmitting messages for the public, as are made with the Western Union Telegraph Company in the ninth article of this agreement. The provisions of this section not to apply to underground lines of wire.

Sixth. The telegraph company agrees to pay annually to the railroad company during the continuance of this agreement for the privileges granted in the first and second clauses hereof, whether the same be availed of or not, the sum of $75,000 in monthly installments of $6,250 each, upon the twentieth day of each month, the year to begin on the twentieth day of September, 1881, and the first payment to be made on the twentieth day of October, 1881, and also to sell, transfer and deliver over to the railroad company as an additional compensation for the privileges hereby granted, the entire line of poles as it now exists on the north side of the railroad company's railroad, between Jersey City and Kensington (except through Marion, East Newark, Newark and Rahway), and also six of the best number eight or nine gauge continuous wires now upon said poles, and on the poles of the telegraph company through said excepted places, and two additional like wires upon the poles of said telegraph company on the south side of said road from Philadelphia to Jersey City, the existing poles and wires so to be delivered to the railroad company, being of an estimated value of forty-one thousand dollars ($41,000), with the agreement that any wires in excess of the six wires upon the poles on the north side of the said road so to be transferred to the railroad company shall remain thereon until they can be removed by the telegraph company, which shall not be later than one year from date: *Provided, however*, That the telegraph company may leave and continue on said poles two wires, as provided for in section seventh.

Seventh. The telegraph company hereby grants the right to the railroad company to place two of its wires upon the poles and in the cable houses of the telegraph company without charge, and also the right to place, from time to time, additional wires necessary for the business of the railroad company upon any of the poles and in the cable houses of the telegraph company on said lines of railroad, upon the payment by the railroad company of four dollars per mile per annum for each of such additional wires; and the railroad company hereby grants the right to the telegraph company to place two of its wires upon the poles and in the cable houses of the
23 railroad company without charge. The telegraph company will furnish at cost, or the railroad company may furnish at its own expense, cable conductors for connection with the railroad company's wires.

Eighth. The telegraph company agrees to transmit over its wires for the railroad company, during the continuance of this agreement,

with the same promptness, efficiency, and dispatch as it does for any other party, for the sum of fifteen thousand dollars ($15,000) per annum, payable in equal monthly installments of one thousand two hundred and fifty dollars ($1,250) each, all messages pertaining to the business of said railroad company, or of any of the companies whose lines are included in Schedule A and covered by this agreement, or any message relating to its business sent by an officer of either company as embraced in said schedule, to and from all points on the lines of said telegraph company throughout the United States and the British provinces, now erected or which may hereafter be erected, as well as upon any lines which the said telegraph company may now or hereafter during the continuance of this agreement secure the use of by purchase, lease, or otherwise in the United States or the British provinces.

The transmission of messages for the railroad company or any of the companies whose lines are included in Schedule A, and the transportation of employés of the telegraph company, as hereinbefore provided, shall be authorized by franks and passes to be issued by each party to the other, upon application of a properly authorized officer of the party requiring such service.

Ninth. At all telegraph stations of the railroad company, upon the lines of said railroads, the railroad company shall, at its option, have the right to receive, transmit, and deliver messages for the public, and if such messages be sent over the telegraph company's wires—the right so to forward them being hereby given to the railroad company—it shall be at the tariff rates of the telegraph company. The operators of the railroad company receiving, forwarding, and delivering messages so interchanged between the telegraph company's and the railroad company's lines, shall be considered as acting as the agents of the telegraph company, and such operators shall remit all receipts for such messages to the telegraph company, which company shall furnish to the railroad company a monthly statement thereof, and the telegraph company agrees to pay monthly to the railroad company one-half of the cash receipts for such service, after deducting all tolls on ocean cable messages and tolls belonging to lines of other companies paid on such messages, which
24 shall be retained in full by the telegraph company. If the railroad company grant the right to any other telegraph company to have an office or offices in any of the depots or buildings of the railroad company, the same privilege in the same depot or building shall be granted to the Western Union Telegraph Company on as favorable terms and with as favorable location as shall be granted to said other company.

Tenth. The railroad company shall have the right to the free use of any telegraphic patent rights, or new discoveries, or inventions that the telegraph company now owns, uses, or controls in its general telegraph business, or which it may hereafter own, use, or control as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

Eleventh. The telegraph company agrees that, as a part of the service for which it is to receive the allowance of fifteen thousand dollars ($15,000) under article eighth of this agreement, it will receive and transmit cable dispatches on the business of any of said railroad companies to Europe and other foreign countries, aggregating at current rates the sum of one thousand dollars ($1000) per annum, the railroad company agreeing to pay any excess on cable messages over that amount in each year.

Twelfth. Neither the general terms of this agreement, nor any stipulation contained herein, shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the railroad company, or any other company whose action it may procure, and in favor of the telegraph company, as against the owner of the fee simple of the land over which the railroad or other company has the right of way, nor as against the exercise of the power of eminent domain upon the part of any other company possessing it by grant from the Commonwealth or State creating such corporation; *And it is further agreed*, That if anything herein contracted to be done, or not to be done, shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of an excess or defect of corporate or legal authority in so doing.

Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their successors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing: *Provided*, That if before the expiration of said twenty years the railroad company shall, from any cause, cease to own, operate or control any or either of the railroads enumerated in Schedule A, without having procured the corporate assent to this agreement of the proprietary corporation, this agreement shall become inoperative as to such railroad or railroads after the railroad company shall cease to own, operate or control the same, and in such event, the annual payment provided for in the sixth section hereof shall be reduced in such proportion not exceeding the mileage of the railroad or railroads so ceased to be owned, operated or controlled, as may be agreed upon between the parties hereto; and in case they cannot agree, such proportion as may be fixed by the arbitrators as per article eighteenth of this agreement.

Fourteenth. It is a condition of this agreement that the railroad company is not to be responsible for, and the telegraph company hereby covenants and agrees to save the railroad company harmless, and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company, while being carried free over any of said railroads under this agreement; and the telegraph company shall not be responsible for, and the railroad company agrees to indemnify and save harmless the telegraph company against any

loss or damages of any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the railroad company under this agreement.

The telegraph company hereby assumes all responsibility for damages resulting from errors, failures, delays, or other defaults or mishaps in the transmission or delivery of messages occasioned by the fault of persons employed directly by it; and the railroad company hereby agrees to pay one-fourth (¼) the amount of any damages, costs, or legal expenses which may be recovered against or incurred by the telegraph company on account of any errors, failures, delays, or other defaults or mishaps in the receipt, transmission, or delivery of messages, occasioned by the fault of persons employed by the railroad company, and acting as agents of the telegraph company, in the transaction of commercial or public telegraph business, the telegraph company agreeing to pay the remaining three-fourths (¾).

Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered, to the treasurer,
26 or an executive officer of the party in default, or if any other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfillment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due or for damages for non-fulfillment of such covenant or of any other covenant.

Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time hereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: *Provided, however*, That the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same.

Seventeenth. All and all manner of contracts, engagements, or arrangements whatsoever hitherto made between the said railroad company or any of the companies named in Schedule A hereto attached, or any company merged or consolidated with the companies therein named and the said telegraph company or any other company or companies, whose stock or lines may be owned or controlled by said telegraph company or made with other telegraph companies or individuals, and assigned and transferred to or owned or claimed by said telegraph company for or in respect to the right

of way over the railroads embraced in the schedule hereto attached, are hereby cancelled and declared to be void and of none effect as between the parties hereto and thereto, and all and all manner of claims arising thereout, whether in suit or otherwise, are hereby terminated and settled, and the parties mutually released therefrom, and the parties complainants in any such suits agree to discontinue the same, each party agreeing to pay its own costs. This not to release any money actually due by either party to the other for rent or services rendered under said contracts.

27 Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination.

Eighteenth. In case of any difference of opinion between the parties hereto in relation to any of the provisions of this agreement, the matter in dispute shall be referred to two arbitrators, one of whom shall be appointed by the railroad company and the other by the telegraph company, and if the two referees so chosen cannot agree, then the two so selected shall select a third like disinterested and competent party, and the decision of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto; but if either of the parties hereto fail or refuse after ten days' written notice from the other to select a referee as aforesaid, then the party not in default shall select a referee as aforesaid for the party so failing or refusing to select, and the said two referees so selected if unable to agree shall select a third like referee, and the three so chosen, or a majority of them, shall proceed as hereinbefore mentioned, and the award of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto.

In witness whereof, &c.

SCHEDULE A.

Philadelphia and Columbia railroad—West Philadelphia to Columbia, Pa.

Pennsylvania railroad—Harrisburg to Pittsburg, Pa.

Schuylkill River branch Pennsylvania railroad—Haverford street to Arsenal bridge.

Delaware extension Pennsylvania railroad—Arsenal bridge, West Philadelphia, to Dock Street depot.

Frazer branch—Frazer to near Woodland.

Columbia bridge—Over Susquehanna river at Columbia, Pa.

York branch—West end Columbia bridge to York, Pa.

Tyrone branch—Tyrone to junction Bald Eagle Valley railroad at Vail Station.

28 Hollidaysburg branch—Altoona to Hollidaysburg, with branch from Duncansville to Portage iron works.

Morrison's Cove branch—Hollidaysburg to Henrietta, Pa., with branch to Martinsburg.

Bloomfield branch—Roaring Spring to Ore Hill, Pa.

Williamsburg branch—Hollidaysburg to Williamsburg, Pa.

Springfield branch—Springfield Junction to Ore Mines.

Indiana branch—Blairsville Intersection to Indiana, Pa.

Port Perry branch—Pennsylvania railroad near Brinton's, to Pittsburg, Virginia and Charleston railroad at Thomson.

Hudson River ferries—New York city to Jersey City, across Hudson river.

New Jersey railroad—Hudson river, at Jersey City to point 3½ miles west of New Brunswick, N. J., with branches from Harsimus Junction to pier No. 3; East Newark to Market street, Newark, and Metuchen to Bonhampton.

Trenton branch Camden and Amboy railroad—3½ miles west of New Brunswick to east end of Trenton Delaware bridge, with branches from Princeton Junction to Princeton, and Monmouth Junction to Kingston.

Perth Amboy and Woodbridge railroad—Rahway to Perth Amboy, N. J.

Millstone and New Brunswick railroad—New Brunswick to East Millstone, N. J.

Rocky Hill and Kingston railroad—Kingston to Rocky Hill, N. J.

Camden and Amboy railroad, main line—Camden to South Amboy, with branches from Bordentown to Trenton, and Jamesburg to Monmouth Junction.

Pemberton and Hightstown railroad—Pemberton to Hightstown, N. J.

Burlington and Mt. Holly railroad—Burlington to Mt. Holly, N. J.

Mt. Holly, Lumberton and Medford railroad—Mt. Holly to Medford, N. J.

Camden and Burlington County railroad—Camden to Pemberton, N. J.

Vincentown branch of Burlington County railroad—Ewansville to Vincentown, N. J.

Belvidere Delaware railroad—Trenton to Manunka Chunk, with branch from Coalport to Millham.

Flemington railroad—Lamberville to Flemington, N. J.

29 Trenton Delaware bridge—Over Delaware river, from Trenton, N. J., to Morrisville, Pa.

Philadelphia and Trenton railroad—West end of Trenton Delaware bridge, at Morrisville, Pa., to Kensington Station, Philadelphia, with branch on Tioga street to Delaware river.

Frankford and Holmesburg railroad—Holmesburg Junction to Bustleton, Pa.

Connecting railway—Philadelphia and Trenton railroad at Frankford Junction, to Mantua Junction, on Pennsylvania railroad.
West Chester railroad—Near Woodland to West Chester, Pa.
East Brandywine and Waynesburg railroad—Downington to New Holland, Pa.
Pomeroy and State Line railroad—Pomeroy, Pa., to Philadelphia, Wilmington and Baltimore Railroad intersection, Del.
Hanover and York railroad—York to Hanover, Pa.
Littlestown railroad—Hanover, Pa., to Maryland State line, near Kingsdale.
Frederick and Pennsylvania Line railroad—State line, near Kingsdale, to Frederick, Md.
Harrisburg, Portsmouth, Mt. Joy and Lancaster railroad—Dillerville to Harrisburg, with branch from Middletown to Columbia, Pa.
Philadelphia and Erie railroad—Erie to Sunbury.
Sunbury, Hazelton and Wilkesbarre railroad—Sunbury to Tomhicken, Pa.
Mifflin and Centre County railroad—Lewistown Junction to Milroy, Pa.
Lewistown and Tuscarora bridge—Over Juniata river, at Lewistown, Pa.
Sunbury and Lewistown railway—Lewistown borough to Selinsgrove Junction, N. C. railway.
Bedford and Bridgeport railroad—Mt. Dallas, Pa., to Maryland State line, with branch on Dunnings creek.
Bald Eagle Valley railroad—Vail Station to Lock Haven, Pa.
Tryone and Clearfield railway—Vail Station to Curwensville, Pa., with branches to coal mines.
Lewisburg and Tryone railroad—Tryone to Pennsylvania Furnace and Montandon to Spring Mills.
30 Lewisburg bridge—Over Susquehanna river, at Lewisburg, Pa.
Newry railroad—Portage iron works to Newry, Pa.
Ebensburg and Cresson railroad—Cresson to Ebensburg, Pa.
South-west Pennsylvania railway—Junction, near Greensburg, to Fairchance, Pa., with branches to coal mines.
West Pennsylvania railroad—Blairsville to Allegheny City, with branch to Butler, Pa.
Pittsburg, Virginia and Charleston railway—South Side, Pittsburg, to Bell Vernon.
Freehold and Jamesburg Agricultural railroad—Jamesburg to Sea Girt, N. J.
Pemberton and Sea Shore railroad—Pemberton Junction to Whiting's N. J.
Columbus, Kinkora and Springfield railroad—Kinkora to New Lisbon, N. J.
Florence Branch railroad—Florence, N. J., to Wood's iron works.
Camden and Philadelphia steamboat ferry—Camden, N. J., to Philadelphia.

West Jersey railroad—Camden to Cape May, N. J., with branch from Glassboro to Bridgeton.
West Jersey and Atlantic railroad—Newfield to Atlantic City.
Swedesboro railroad—Woodbury to Swedesboro, N. J.
Salem railroad—Elmer to Salem, N. J.
Columbia and Port Deposit railroad—Columbia, Pa., to Port Deposit, Md.
Cumberland Valley railroad—Harrisburg to Potomac river, at Powell's Bend, Md.
Dillsburg and Mechanicsburg railroad—Mechanicsburg to Dillsburg, Pa.
Mont Alto railroad—Junction near Chambersburg, to Waynesboro, Pa.
Southern Pennsylvania railroad—Junction near Marion, to Richmond, Pa.
Martinsburg and Potomac railroad—Potomac river, at Powell's Bend, to Martinsburg, W. Va.
Northern Central railway—Baltimore, Md., to Sunbury, Pa., with branches to Green Spring and Canton, Md.
Elmira, Jefferson and Canandaigua railroad—Watkins to Canandaigua, N. Y.
Chemung railroad—Horse Heads Junction, Erie railway, to Watkins, N. Y.
31 Elmira and Williamsport railroad—Williamsport, Pa., to junction with Erie railway, near Elmira, N. Y.
Shamokin Valley and Pottsville railroad—Sunbury to Mt. Carmel, Pa., with branch to Hickory Ridge colliery.
Summit Branch railroad—Millersburg to Williamstown, Pa.
Baltimore and Potomac railroad—Baltimore, Md., to south end Long bridge, Washington, D. C., with branch from Bowie to Pope's creek.
Alexandria and Washington railroad—South end Long bridge to Alexandria, Va.
Alexandria and Fredericksburg railroad—South end Long bridge to Quantico, Va.
Bellefonte and Snow Shoe branch—Milesburg to Bellefonte, Pa.
Allegheny Valley railroad—Pittsburg to Oil City, and Red Bank to Driftwood, with branches.

EXHIBIT 2.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *Oct.* 21, 1901.

R. W. Downing, comptroller, Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due October 21, 1901.
Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 3.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due Oct. 21, 1901, as per contract..... $6250 —

6250 —

32 Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher sixty-two hundred and fifty dollars in full of the above account.

Oct. 22d, 1901.

PENNSYLVANIA RAIL ROAD COMPANY.

(Sig'd) H. P. CONNER, *Ass't Treas.*

Form No. 10. Approved: —— —— supt.
Paid Oct. 21, 1901, by M. T. Wilbur, treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 4.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *Nov.* 20, 1901.

R. W. Downing, compt., Philada., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due Nov. 20, '01.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 5.

The Western Union Telegraph Company to Pennsylvania Railroad Co., Dr.

Payment due Nov. 20, 1901, as per contract..... $6250—

$6250—

Received of treasurer W. U. Teleg'h Co., subject to the notice upon

the back of this voucher, sixty-two hundred & fifty dollars in full of the above account.

Nov. 21, 1901.

PENNSYLVANIA RAILROAD COMPANY.

(Sig'd) H. P. CONNOR, *Ass't Treas.*

33 Form No. 10. Approved: —— ——, supt.
Paid Nov. 20 1901 by M. T. Wilbur treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 6.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *Dec.* 20, 1901.

R. W. Downing, comptroller, Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due Dec. 20 1901 (Pennsylvania R. R. Co.)

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 7.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due Dec. 20, 1901 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher, sixty-two hundred & fifty dollars in full of the above account.

Dec. 21, 1901.

PENNSYLVANIA RAIL ROAD CO.

(Signed) H. P. CONNER, *Ass't Treas.*

34 Form No. 10. Approved: —— —— supt.
Paid Dec. 20, 1901 by M. T. Wilbur treasurer.
No. —. Correct. H. C L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 8.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *Jan.* 20, 1902.

Pennsylvania R. R. Co., Philadelphia, Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250.—Payment due as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 9.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.,

Payment due January 20, 1902 as per contract.....	$6250 —
	6250 —

Received of treasurer W. U. Tel·g'h Co., subject to the notice upon the back of this voucher sixty-two hundred & fifty dollars in full of the above account.

Jan. 21, 1902

PENNSYLVANIA RAIL ROAD COMPANY.

(Signed) H. P. CONNER, *Ass't. Treas.*

Form No. 10. Approved: —— ——, supt.
Paid Jan. 20 1902 by M. T. Wilbur, treasurer.
No. —
Correct. H. C. L.

35 NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 10.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *Feb.* 20, 1902.

Pennsylvania R. R. Co., Philadelphia, Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due Feb. 20 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 11.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due February 20 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher — dollars in full of the above account.

Feb'y 21, 1902.

PENNSYLVANIA RAIL ROAD COMPANY.

(Signed) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.

Paid Feb. 20, 1902 by M. T. Wilbur, treasurer.

No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this
36 voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 12.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *March* 20, 1902.

Mr. R. W. Downing, comptroller Penna. R. R. Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due March 20, 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 13.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due March 20 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher — dollars in full of the above account.
March 21 1902

PENNSYLVANIA RAILROAD COMPANY.
(Signed) H. P. CONNOR, *Ass't Treas'r.*

Form No. 10. Approved —— ——, supt.
Paid Mar. 20/1902 by M. T. Wilbur, treasurer.
No. — Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this
37 voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 14.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *Ap'l* 21, 1902.

Mr. R. W. Downing, compt. Penna. R. R. *R.* Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order on National Bank of Commerce for $6250. Payment due April 20th, '02 as per contract.
Please sign and return enclosed voucher.
Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 15.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due April 20th 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon

the back of this voucher sixty two hundred & fifty dollars in full of the above account.

April 22 1902.

PENNSYLVANIA RAIL ROAD CO.
(Sig'd) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.
Paid April 21, 1902 by M. T. Wilbur, treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this
38 voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 16.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *May* 20, 1902.

Mr. R. W. Downing, compt. Penna. R. R. *R.* Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce for $6250. Payment due May 20, 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 17.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due May 20 1902 as per contract..... $6250—

$6250—

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher sixty-two hundred & fifty dollars in full of the above account.

May 21, 1902.

PENNSYLVANIA RAIL ROAD COMPANY.
(Signed) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.
Paid May 20 1902 by M. T. Wilbur treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

39 EXHIBIT 18.

Western Union Telegraph Company; treasurer's office, Broadway and Dey street.

NEW YORK, *June* 20, 1902.

Mr. R. W. Downing, compt. Penn. R. R. Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce for $6250. Payment due June 20, 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 19.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due June 20 1902 as per contract..... 6250 —

6250 —

Received of — W. U. Teleg'h Co., subject to the notice upon the back of this voucher — dollars in full of the above account.

June 21 1902

THE PENNSYLVANIA RAILROAD COMPANY.

(Sig'd) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.
Paid Jan. 20 1902 by M. T. Wilbur, treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, il is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

40 EXHIBIT 20.

Pennsylvania Railroad Company.

PHILADELPHIA, 15*th May*, 1902.

Mr. Robert C. Clowry, pres't Western Union Tel. Co., New York city.

MY DEAR SIR: In pursuance of action taken by the board of directors of this company on 14th, May, 1902, I send the enclosed notice.

Kindly acknowledge receipt, and oblige,

Very truly yours,

(Signed) LEWIS NEILSON, *Secretary.*

To the Western Union Telegraph Company:

You are hereby notified to remove within six (6) months from the 1st day of June, 1902, all of your poles, wires, and property from the right-of-way and property of this company and of the other companies named in a certain agreement between this company and you dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached), or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and of the other companies referred to in good condition and free from the encumbrance of your said poles, wires, and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right-of-way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles, and other property, to the satisfaction of the general manager of this company.

In witness whereof, the said The Pennsylvania Railroad Company has caused its corporate seal to be hereunto affixed, duly attested by the signature of its proper officers, this fourteenth day of May, anno Domini, 1902.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By A. J. CASSATT, *President.*

Attest:

[SEAL.] (Signed) LEWIS NEILSON, *Secretary.*

41 EXHIBIT 21.

Western Union Telegraph Company,

NEW YORK, *May 20th*, 1902.

A. J. Cassatt, Esq., pres't Penna. R. R. Co., Philadelphia, Pa.

DEAR SIR: I am in receipt of a letter from Lewis Neilson, secretary, dated May 15th, in relation to the termination of the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company, dated September 20th, 1881; also a letter from A. J. County, assistant secretary, in relation to the termination of contracts of the Philadelphia, Wilmington and Baltimore Railroad Company; the Delaware Railroad Company; the Delaware, Maryland and Virginia Railroad Company; the Junction Railroad Company, and the Philadelphia and Baltimore Central Railroad Company, respectively, with the Western Union Telegraph Company.

I understand that for some time prior to my election as president of this company, in March last, negotiations had been in progress between the officers of our respective companies for a renewal of these contracts on terms satisfactory to both parties; and Vice-President Clark has recently turned over to me a draft of proposed new agreement in connection with which I believe we have been awaiting some figures from your company. I shall be glad to take up the matter actively, either here or at Philadelphia, at your convenience.

Yours truly,
(Signed) R. C. CLOWRY,
Pres't & Gen. Mgr.

EXHIBIT 22.

Pennsylvania Railroad Company.

PHILADELPHIA, *May 21st*, 1902.

Mr. R. C. Clowry, pres't & gen. mgr. Western Union Tel. Co., N. Y. city.

DEAR SIR: In reply to your favor of the 20th instant, I beg to say that none of the companies named in your letter desires to renew or extend its contract with the Western Union Telegraph Co. As you are aware, the contract between the Western Union Telegraph Co. and the Pennsylvania R. R. Co. terminated, under its terms, on the 20th of September, 1901, and the notices to which you
42 refer, for the removal of the poles within six months, were given in accordance with a provision of the contract. If your company desires to discuss any temporary arrangements which

may be necessary during the time allowed for the removal of your poles, we shall be glad to take up those matters with you at your convenience.

Yours truly,

(Signed) A. J. CASSATT, *Pres't.*

EXHIBIT 23.

Western Union Telegraph Company, president's office.

NEW YORK, *June* 26, 1902.

A. J. Cassatt, Esq., president, etc., Philadelphia, Pa.

DEAR SIR: I have your favor of May 21st in which you state that none of the companies named in my letter of the 20th desires to renew or extend its contract with the Western Union Telegraph Company, and that the contract between the Western Union Telegraph Company and the Pennsylvania Railroad Company terminated under its terms on the 20th of September, 1901, and that the notices which were referred to for the removal of the poles within six months were given in accordance with a provision of the contract and that if my company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of its poles you will be glad to take up those matters with me at my convenience.

Replying thereto, I have to state that this company will be glad to have a conference with your company with a view of adjusting amicably any and all differences that may be found to exist between them, thus avoiding litigation and any possible interference with the duties which this company owes to the Government and the public. I request and urge that you fix a time and place for such a conference, which seems to be the more necessary because your letter appears to be based on a material misunderstanding of the facts in relation to the termination of the contracts and the rights of this company, since some of the contracts referred to in your letter are perpetual in their terms, or run during the life of the parties, and, therefore, cannot be terminated by one party without the consent of the other. As bearing on the subject, I enclose a copy of a letter which I sent and delivered yesterday to the
43 Postal Telegraph-Cable Company; also copies of two letters, dated June 24th, to James McCrea, Esq., vice-president, Pittsburg, Pa., which letters were sent only after a careful examination of the contracts and the legal rights of the parties by our counsel.

It seems proper to add that such a conference as we ask ought to be had before your company concludes any arrangement adverse to this company which would necessitate litigation by this company to enforce its rights. Under the contracts by which the lines of this company on the roads mentioned in your letter of May 21st were

brought into existence, the laws of Congress and the constitution and laws of Pennsylvania, this company is advised that it is entitled to maintain and operate its lines of telegraph on the said railroads, subject, only, at most, to make a fair and reasonable compensation to the railway companies for this right, and this company is willing and hereby offers to make such compensation. If your company declines further to contract with this company, I respectfully request a meeting for the purpose of agreeing upon the amount of such compensation, and, if no such agreement can be made, that the matter be submitted to arbitration, your company selecting one arbitrator and this company another, and the two arbitrators thus selected to choose a third, or to have the amount of such compensation determined in any other equitable manner. I shall appreciate an answer at your early convenience, and I venture to express the wish that, in view of the large public and private interests which we represent, that you will meet this company in its earnest endeavor to avoid unnecessary and wasteful litigation.

Very truly yours,

(Signed) R. C. CLOWRY, *President.*

3 inclosures.

EXHIBIT 24.

The Pennsylvania Railroad Company.

PHILADELPHIA, *July 5th*, 1902.

Mr. R. C. Clowry, president and general manager, Western Union Telegraph Company.

DEAR SIR: I beg to acknowledge receipt of yours of the 26th ultimo.

In my letter of the 21st of May I suggested a conference
44 which I thought you might possibly desire to have for the purpose of making any temporary arrangements you might find necessary under the notice which has been given to your company. This conference I infer you do not care to have.

A conference concerning the matters you suggest would be useless as your company asserts rights upon the lines of railroad of the companies I represent which they cannot concede.

Noting your reference to the Postal Telegraph-Cable Company, I beg to advise you that a contract has been concluded with that company covering the railroads included in the contract which terminated on September 20th last, under the terms of which the Postal Telegraph-Cable Company will at once begin to transact a commercial telegraph business at the stations of the railroad companies, and while the right of your company to do business at such stations has ceased, yet, as we are desirous of causing you as little inconvenience as possible, we will permit our operators to continue to receive and

transmit such messages as the public may desire to send by your lines until September 30th next; the operators to be considered as acting as your agents in that respect and you to account to the railroad companies for their compensation on a basis equal to that fixed by the former contract.

To avoid unnecessary loss to your company incident to the removal of your poles and wires, we are willing to purchase, at a fair valuation, such of the lines as we can make use of, and if you desire to take up this question, Mr. Charles M. Sheaffer, superintendent of telegraph, will hold himself in readiness to meet a representative of your company to agree upon the price of such lines.

Yours truly,

(Signed) A. J. CASSATT, *President.*

EXHIBIT No. 25.

(Ten cent revenue stamp.)

POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *Feb'y 17th*, 1899.

I, Perry S. Heath, acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department:

45 In testimony whereof, I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the city of Washington the day and year above written.

PERRY S. HEATH,
Acting Postmaster General.

[SEAL.] B. W. T.

Annexed to the foregoing is the following, to wit:

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway, New York.

JUNE 5TH, 1867.

Resolved that this company does hereby accept the provisions of the act of Congress, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature

of the acting president of the company, and the seal of the corporation in compliance with the fourth section of said act of Congress.

Adopted unanimously.

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Sec'y. W. U. Tel. Co.

[Seal Western Union Telegraph Co.]

Filed June 8th, 1867,
JOS. H. BLACKFAN, *Chief Clerk.*

46 EXHIBIT 26.

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
against
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad and Canal Company, Defendants. } Petition.

The Western Union Telegraph Company, by its attorney, comes and represents:

(1.) That it is a telegraph company, a corporation duly organized under the laws of the State of New York relating to telegraph companies and a citizen and resident of the State of New York, having its principal place of business in the southern district of said State, and is and for many years last past has been doing business within the State of New York, the State of New Jersey, and the other States and Territories of the United States, and within the Dominion of Canada, as a telegraph company.

(2.) That the defendant, The Pennsylvania Railroad Company is a corporation duly organized under the laws of the State of Pennsylvania and is a citizen and resident of the State of Pennsylvania, having its principal place of business in the city of Philadelphia; that the defendant The United New Jersey Railroad and Canal Company is a corporation duly organized under the laws of the State of New Jersey and is a citizen and resident of said State.

(3.) That the matters in controversy in this suit exceed the value of two thousand dollars, exclusive of interest and costs and are wholly between citizens of different States and arise under the Constitution and laws of the United States and in which the Western Union Telegraph Company claims privileges and rights under acts of Congress and the Constitution and laws of the United States.

(4.) The Western Union Telegraph Company further says that it was organized as a telegraph company as aforesaid in the year 1851, and thereupon and thereafter began the work of the
47 construction and operation of telegraph lines in the State of New York and elsewhere, and since said time has been con-

tinuously engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has extended its lines as a continuous system into and through the State of New Jersey, and through all the States and Territories of the United States, and through the Dominion of Canada; and that its lines connect with ocean cables leading to Central and South American and foreign countries, through and over which system of lines it transmits upwards of 65,000,000 messages yearly for the public and for the Government of the United States, exclusive of railroad messages, messages relating exclusively to its own business, and messages transmitted over wires leased by it to private parties; that at the present time said system of telegraph lines under its operation and control, comprises over 192,000 miles of poles and cables and over 900,000 miles of wire; and its capital stock is distributed among over 11,000 stockholders. That the lines of telegraph in the system above described have been in operation for many years past and are relied upon by the public and by the Government of the United States and by the governments of foreign countries as a means of quick transmission of intelligence to and from all parts of the United States and to and from foreign countries.

(5.) That the Congress of the United States duly passed an act, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes;" and that the Western Union Telegraph Company, on or about the 8th day of June, 1867, duly accepted the provisions of said act by filing with the Postmaster-General of the United States in writing the acceptance by said company of all the restrictions and obligations of the said act of Congress, and thereby and thereafter continuously became, and has been and still is, entitled to all the privileges and rights granted by the said act of Congress to telegraph companies, thus accepting the benefits, restrictions and obligations of said act, and the said telegraph company has, at all times, complied with the provisions of said act and has rendered to the various departments and officers of the Government of the United States all the duties and services required by said act, giving to the said Government of the United States priority over all other business, and at rates fixed by the Postmaster-General, which rates, as thus fixed by him, have been very much lower than the reasonable rates charged for similar services rendered to the general public.

48 A duly exemplified copy of the plaintiff's said acceptance of the said act of July 24, 1866, is hereto attached as part of this petition, marked *Exhibit No.* 1.

(6.) That by act of Congress, approved June 8, 1872, all railroads or parts of railroads which then or thereafter might be in operation, were declared to be established post-roads, and by a further act of Congress, approved March 1, 1884, all public roads and highways, while kept up and maintained as such, were declared to be post-roads; and by the provisions of said act of Congress, approved July 24, 1866, there was granted to any telegraph company then organ-

ized, or which might thereafter be organized under the laws of any State, and which accepted in writing the provisions of said act, the right to construct, maintain and operate telegraph lines through and over any portion of the public domain and over and along any of the military or post-roads of the United States which then were or might thereafter be declared such by law, subject to the condition only that such lines of telegraph should be so constructed and maintained as not to obstruct the navigation of streams or waters over, under or across which the same should be laid, or interfere with the ordinary travel on such military or post-roads.

(7.) That the said acts of Congress apply to the railroads of the defendants herein mentioned and described, and the said railroads are post roads of the United States duly established by act of Congress in that behalf provided, and also public roads and highways under said acts of Congress and the laws of the State of New Jersey relating to said railroads. That the plaintiff, The Western Union Telegraph Company, having duly filed its written acceptance with the Postmaster-General of the restrictions and obligations of the said act of July 24, 1866, and fully complied with all the requirements of said acts of Congress, above mentioned, and of law, has the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendants herein mentioned and described so as not to interfere with the ordinary travel thereon, and the plaintiff is ready and willing to make to the defendants, and each of them, a just compensation for such use by the plaintiff of the roadway or right of way of the defendant companies for the plaintiff's telegraph lines over and along the said railroads of the defendants.

(8.) That the said grant by the United States in and by the aforesaid acts of Congress of the right to construct, operate and maintain the telegraph lines of the plaintiff on the railroads of
49 the defendants was a grant made upon a full, valuable and continuing consideration paid and rendered by the plaintiff to the United States, which consideration was the agreement of the plaintiff evidenced by the plaintiff's written acceptance of the act of July 24, 1866, duly filed on June 8, 1867, with the Postmaster General, of the restrictions and obligations of the said act, and the performance by the plaintiff of all of the duties and obligations created and required by said acts of Congress. That the plaintiff has since said acceptance of said act performed all its obligations required by said acts and by law, and the plaintiff has ever since the date of filing of said acceptance given, and is still giving, to the United States, and to the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of the plaintiff company, situated over and along the railroads of the defendants, at rates annually fixed by the Postmaster General, which rates are far less than the rates charged, paid and received by the plaintiff for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered to the Government. The plaintiff has accepted, among others, the provisions of the said act of Congress of

July 24, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said act of Congress. The plaintiff states that by reason of the premises, its acceptance of the said act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by the plaintiff of the provisions of the said acts of Congress, the right granted by the said act of July 24, 1866, to the plaintiff to construct, maintain and operate its lines of telegraph over and along the railroads of the said defendants became vested, and the said grant is in full force and effect, and the plaintiff avers that its rights to construct, maintain and operate its said lines of telegraph over and along the railroads, and right of way of the defendant companies is complete, the plaintiff being under an obligation or liability only to make fair and reasonable compensation to the defendants for the use of the said right of way or railways of the defendants by the plaintiff in the manner and under the restrictions of the said acts of Congress.

(9.) That the defendant, the United New Jersey Railroad and Canal Company, is the owner of lines of railways extending from Jersey City in the State of New Jersey to the Delaware river at the city of Trenton in said State, with the following branches:

50 One extending from Princeton Junction in the county of Mercer to the borough of Princeton in said county.

One extending from the city of Rahway in the county of Union to the city of Perth Amboy in the county of Middlesex.

One extending from South Amboy in the county of Middlesex to the city of Camden in the county of Camden.

One extending from the main line in the town of Harrison, Hudson county, to Centre street, Newark, Essex county.

One extending from Monmouth Junction, Middlesex county, to the southerly terminus of the Rocky Hill railroad, near Kingston, Somerset county.

One extending from Millham Junction on the main line in Hamilton township in connection with Belvidere connection in Trenton City.

One extending from junction with Belvidere connection and Belvidere Delaware R. R. in Trenton City to connection with Bordentown branch.

One extending from junction with the main line in connection with Belvidere and Delaware railroad and Bordentown connection.

One extending from the main line at Monmouth Junction to Jamesburg, Middlesex county.

One extending from Camden & Amboy division at Bordentown Burlington county, to Trenton, Mercer county.

One extending from the main line at Florence to Delaware river Florence Foundry Burlington county.

That all said railways are within the State of New Jersey and within the jurisdiction of this court in this district; that at many points said lines of railway are constructed and maintained over

and along the public streets, roads and highways in cities and villages and over and along public highways in the country and within the limits of said streets, roads and highways; that The Pennsylvania Railroad Company, defendant herein, is in possession, control and operation of the said lines of railway under a lease from the said United New Jersey Railroad & Canal Company for a period of 999 years, from the first day of July, 1871.

That the railroads of the United New Jersey Railroad and Canal Company hereinbefore described were authorized and constructed and are now maintained, operated and controlled under and by virtue of certain acts of the legislature of the State of New Jersey, as follows:

(1.) An act entitled "An act to incorporate the Delaware and Raritan Canal Company," passed February 4, 1830.

51 (2.) An act entitled "An act to incorporate the Camden and Amboy Railroad and Transportation Company," passed February 4, 1830.

(3.) An act entitled "An act to incorporate 'The New Jersey Rail Road and Transportation Company,'" passed March 7, 1832.

(4.) An act entitled "An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies," passed February 15, 1831.

(5.) An act entitled "A further supplement to the act entitled 'An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies,'" passed March 15, 1837.

(6.) An act entitled "An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia," approved February 27, 1867.

(7.) An act entitled "An act to enable the United Railway and Canal Companies to consolidate their stock and to consolidate or connect with other companies," approved March 17, 1870.

(8.) An act entitled "An act to amend an act entitled 'An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia,'" approved March 14, 1872.

(9.) An act entitled "An act to validate and confirm a certain lease and contract between the companies now known as 'The United New Jersey Railroad and Canal Company' and 'The Pennsylvania Railroad Company,'" approved March 27, 1873.

That in and by said last mentioned acts and the several supplements thereto, and acts amendatory thereof, and the general public laws of the State of New Jersey, the said several railroads of the said defendants hereinbefore described, were created and made and now are public highways, and as such subject to occupation and use by telegraph companies under the provisions and conditions of the act of Congress of July 24, 1866, as herein fully set forth.

(10.) That for more than forty years last past there has been maintained and operated over and along the right of way of the said railroads hereinbefore described a line of telegraph owned,

maintained and operated by the Western Union Telegraph Company, or its predecessors in title or estate or right, which has thus been maintained and operated with the consent of the de-
52 fendants, The Pennsylvania Railroad Company, The United New Jersey Railroad & Canal Company or their predecessors in title, and which has been and is now so located, maintained and operated as not to interfere with the ordinary operation and management of the said railways or the ordinary travel thereon; that the Western Union Telegraph Company is in possession and control of the said telegraph lines and the same have been and still are connected with its system of telegraph in other States, Territories and foreign countries and have been continuously operated by it as a means for the transmission of intelligence for the public and for the Government of the United States and over the same are daily sent many thousands of messages to and from its main office in the city of New York and to and from the various States and Territories of the United States and foreign countries; that the said telegraph lines have been thus maintained and operated by the Western Union Telegraph Company for the 20 years last past with the consent of the Pennsylvania Railroad Company.

(8.) That said Pennsylvania Railroad Company has recently, to wit May 15th, 1902, notified the Western Union Telegraph Company to remove its poles and wires, and has withdrawn its consent to plaintiff to longer occupy its premises; that thereupon the said Western Union Telegraph Company duly made application to the said Pennsylvania Railroad Company to have ascertained and determined the amount of compensation to which said Pennsylvania Railroad Company would be entitled for the continued maintenance and operation of the said lines of telegraph over and along the said railways of the defendants under and subject to the terms, conditions and restrictions of the said act of Congress of July 24, 1866; but said railroad company refused and declined to treat with the Western Union Telegraph Company or to agree or attempt to agree upon the amount of compensation for the construction, maintenance and operation of said telegraph lines or any of them over and along the said railways; on the contrary the said defendant railroad companies deny that the said acts of Congress confer upon the Western Union Telegraph Company any right to construct, maintain or operate its telegraph lines over and along said railways.

The Western Union Telegraph Company further says that the said lines of telegraph can continue to be located, maintained, and operated without interference with the ordinary travel on the said railroad or the ordinary use, management, and operation of the said railway and that the plaintiff seeks to construct, maintain
53 and operate its lines of telegraph along said lines of railway subject to the conditions named in said act of Congress of July 24, 1866, that such lines of telegraph should be so constructed and maintained and operated as not to interfere with the ordinary travel on the said railroad, and subject also to the condition that when in the future, the location, maintenance and operation of its

said lines should be found to interfere with the ordinary travel upon and use of said railways, to make such reasonable changes in the location, maintenance and operation of said parts of said lines of telegraph as that the ordinary travel upon said railways should be and remain uninterfered with by such lines of telegraph, as provided in the said act of Congress of July 24, 1866.

(12.) That the plaintiff, on June 8, 1867, duly accepted as aforesaid the said act of July 24, 1866, and acting thereon immediately entered upon the performance of and has ever since continued to perform all of its duties and obligations thereunder to the United States and the public, and the plaintiff was in possession and enjoyment of its telegraph lines over and along said defendants' railroads herein mentioned and described and of the rights granted and conferred upon it by said act of July 24, 1866, long before and at the time the Pennslyvania Railroad Company became the lessee of said railroads or acquired any interest therein or use or control thereof, of all of which the defendants then and there had notice; and the plaintiff is advised and now avers that the rights of the defendants in said railroads are subject to the rights of the plaintiffs under said acts of Congress and the laws of New Jersey and in particular the plaintiff avers that the said lease of said railroads to The Pennsylvania Railroad Company, defendant herein, and any rights acquired by said Pennsylvania Railroad Company in or to said railroads or the use, possession or control thereof are subject to the rights of the plaintiff granted and conferred upon it by the said act of Congress of July 24, 1866, and acquired by the plaintiff by its acceptance of said act and its performance of all of the obligations and requirements of said acts of Congress.

(13.) The Western Union Telegraph Company further represents that it is necessary for the continued maintenance and operation of its said lines of telegraph, that it shall enjoy the right to set poles and the right to maintain poles set along the right of way of the said railway company at such point or points thereon as that they will not interfere with the ordinary travel upon and use of the said railways, as the said poles have been heretofore and now are
54 located thereon, with the right to place cross arms and fixtures thereon and to string wires, together with the right to maintain and operate the same, and also the right to cable crossings where the said lines cross navigable waters, in order to connect the lines of wire upon the poles with other lines of wire belonging to the said telegraph company, upon the said railways, as the plaintiff's system is now constructed, maintained and operated for the communication of intelligence to all parts of the United States, and as the same may be required to be extended and increased to meet the increasing demand for facilities of communication between different parts of the country as an agent of interstate commerce, and as a method of transmitting messages for the Government of the United States and for the several departments thereof; that the plaintiff has sought from the said Pennsylvania Railroad Company to procure its consent to the continuance in the present location upon the said

right of way of the poles, cables, wires and fixtures where the same do not now interfere with the ordinary travel upon and use of said railways, with the provision that the same should be subject to reasonable changes to meet the requirements of changes in the situation of the said railways from time to time, so that the telegraph lines should not at any time hereafter interfere with the ordinary travel upon and use of the said railways; that the said railroad companies have refused to consent to the said location of the said poles, cables and wires and fixtures over and along the said railway or to agree or attempt to agree upon the amount of compensation which the said telegraph company should pay to the defendants for the use of their railroads by the plaintiff in order to construct, maintain and operate on said railroads a line of telegraph by the plaintiff as hereinbefore set forth, subject to all the conditions and provisions of the said act of Congress of July 24, 1866.

(14.) That the Western Union Telegraph Company attaches hereto a map showing upon the same the location of cable crossings, of poles and number of wires thereon, the location of wires upon the bridges of the said railway companies, and also the location of the said line of poles with reference to the tracks and structures of said railways as now located and maintained as hereinbefore set forth. And upon which location the plaintiff seeks to maintain and operate under the provisions, restrictions and conditions of said act of Congress of July 24, 1866, its said telegraph lines, and for the use of the defendant's said railroads the plaintiff is ready and willing and has offered and hereby again offers to make compensation.

55 (15.) The Western Union Telegraph Company further says that on or about the 6th day of July, 1894, it duly caused a certificate to be signed by its president and its corporate seal to be attached and filed in the office of the secretary of state of the State of New Jersey, in compliance with the provisions of an act of the legislature of the State of New Jersey, entitled "An act relative to corporations," approved May 15th, 1894, and a supplement thereto approved May 17, 1894.

Wherefore, the Western Union Telegraph Company prays that this court may proceed to appoint commissioners, or to empanel a jury, or issue a writ of *ad quod damnum*, or issue such other process or take such other modes of proceeding as may be agreeable to the principles and usages of law, and as shall be necessary to make inquiry and assessment of the amount of compensation to be paid by the said Western Union Telegraph Company for the use of the roadway or right of way of the defendants to construct, maintain, and operate its said line of telegraph over and along the said railways of the defendants, subject to the conditions and provisions named in the said act of Congress of July 24, 1866; and that upon the payment into court or to the proper owners, defendants herein, as this court may direct, of the amount of such compensation for the said rights and interests acquired thereby by the said Western Union Telegraph Company, possession be adjudged to the Western

Union Telegraph Company by this court of the said use, rights and interests according to law, and that the title to the said rights and interests as against the defendants and each of them, thereby vest in the said Western Union Telegraph Company for the purposes aforesaid, and that the court will divide the sum so paid and order its distribution among the defendants herein according to their respective rights, as they may appear; and for such other and further proceedings, order and judgment as may be proper in the premises.

The plaintiff has caused this petition to be signed by its president and its corporate seal attested by its secretary to be hereto affixed.

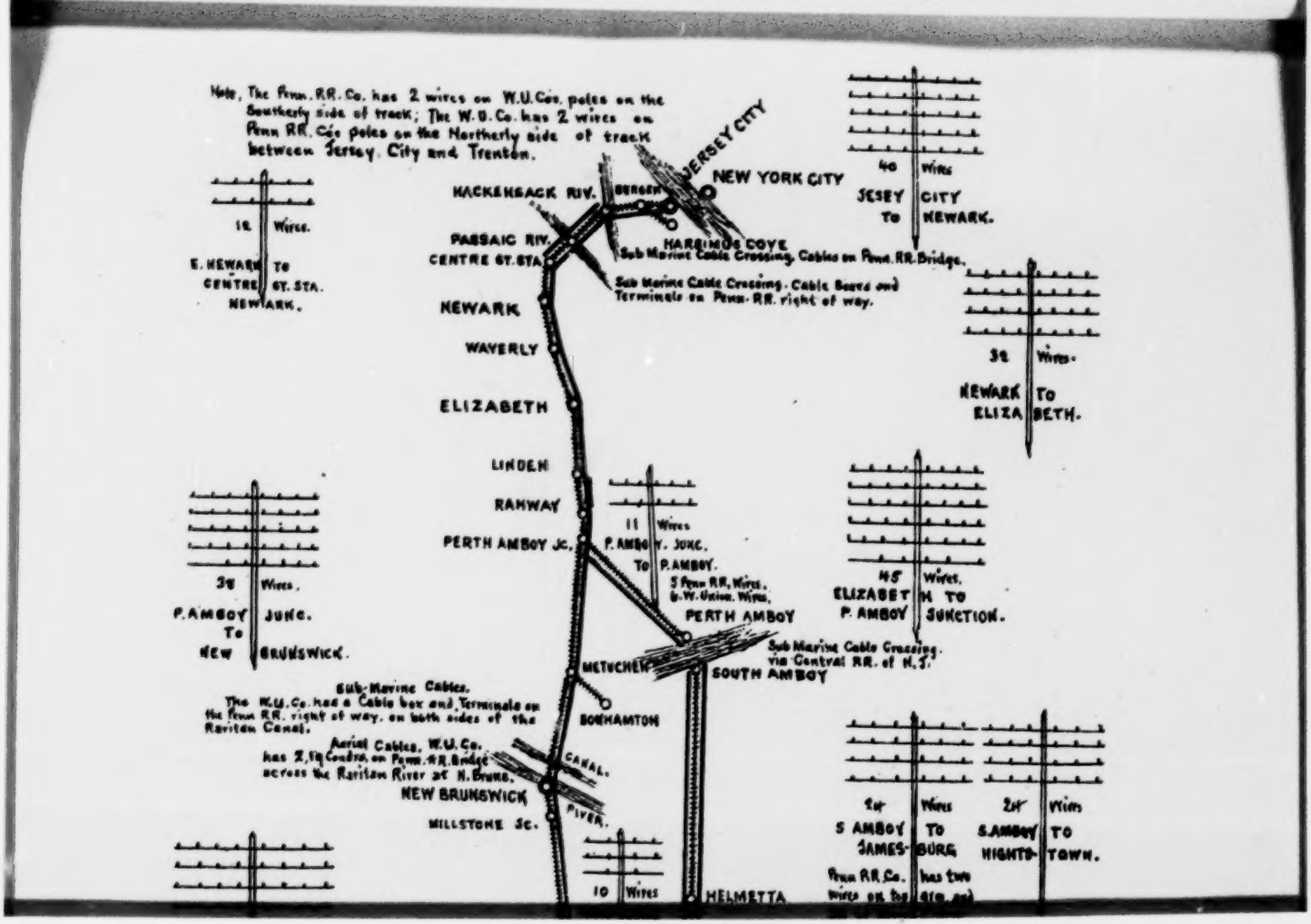
—— ——, *President.*

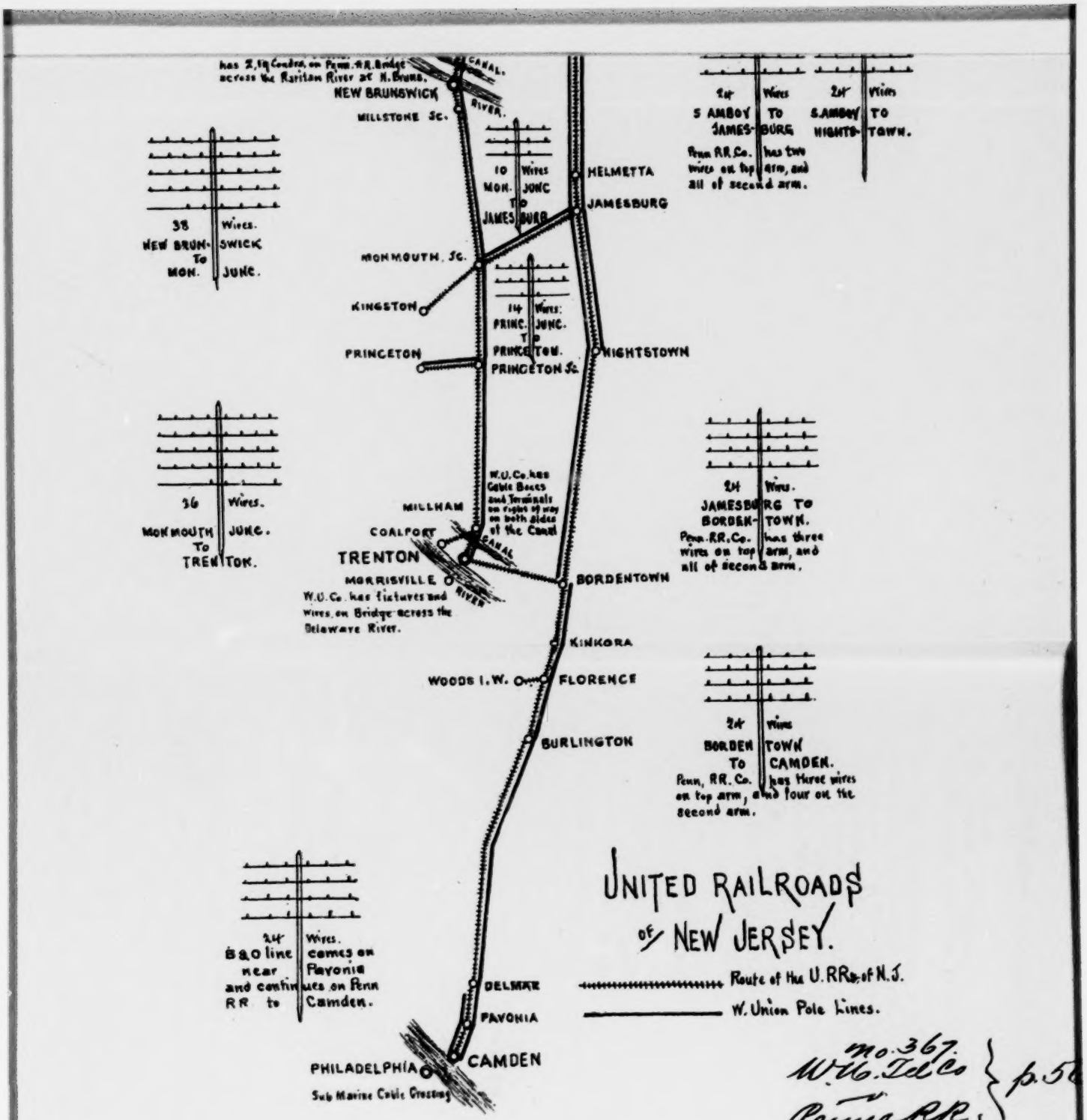
Attest: —— ——, *Secretary.*

—— ——,

Attorney for Western Union Telegraph Company.

(Here follows diagram marked p. 56.)


Note, The Penn. R.R. Co. has 2 wires on W.U.Cos. poles on the Southerly side of track; The W.U. Co. has 2 wires on Penn RR. Co's poles on the Northerly side of track between Jersey City and Trenton.
JERSEY CITY
NEW YORK CITY
40 Wires
JESEY CITY TO NEWARK.
HACKENSACK RIV.
BERGEN
HARRISONS COVE
Sub Marine Cable Crossing. Cables on Penn. R.R. Bridge.
PASSAIC RIV.
CENTRE ST. STA.
Sub Marine Cable Crossing. Cable Boxes and Terminals on Penn. R.R. right of way.
12 Wires.
E. NEWARK TO CENTRE ST. STA. NEWARK.
NEWARK
WAVERLY
ELIZABETH
32 Wires.
NEWARK TO ELIZABETH.
LINDEN
RAHWAY
PERTH AMBOY JC.
11 Wires P. AMBOY JUNC. TO P. AMBOY.
5 Penn R.R. Wires, 6 W. Union. Wires.
PERTH AMBOY
45 Wires. ELIZABETH TO P. AMBOY JUNCTION.
38 Wires. P. AMBOY JUNC. TO NEW BRUNSWICK.
Sub Marine Cable Crossing via Central R.R. of N.J.
METUCHEN
SOUTH AMBOY
BONHAMTON
Sub-Marine Cables.
The W.U.Co. has a Cable box and Terminals on the Penn R.R. right of way, on both sides of the Raritan Canal.
Aerial Cables. W.U.Co. has 2, 12 Conductor on Penn. R.R. Bridge across the Raritan River at N. Brunsw.
CANAL.
NEW BRUNSWICK
RIVER.
MILLSTONE JC.
10 Wires
HELMETTA
12 Wires S AMBOY TO JAMES-BURG
24 Wires S.AMBOY TO HIGHTS-TOWN.
Penn R.R.Co. has two wires on the 12 on


has 2, 19 Conductors on Penn. R.R. Bridge across the Raritan River at N. Brunswick.
NEW BRUNSWICK
CANAL.
RIVER.
MILLSTONE Jc.
38 Wires. NEW BRUNSWICK To MON. JUNC.
10 Wires MON. JUNC TO JAMESBURG
HELMETTA
JAMESBURG
MONMOUTH Jc.
KINGSTON
14 Wires: PRINC. JUNC. TO PRINCETON.
PRINCETON
PRINCETON Jc.
HIGHTSTOWN
24 Wires S AMBOY TO JAMESBURG
Penn R.R. Co. has two wires on top arm, and all of second arm.
24 Wires S. AMBOY TO HIGHTSTOWN.
36 Wires. MONMOUTH JUNC. To TRENTON.
W.U. Co. has Cable Boxes and Terminals on right of way on both sides of the Canal
MILLHAM
COALPORT
CANAL
TRENTON
MORRISVILLE
RIVER
W.U. Co. has fixtures and wires on Bridge across the Delaware River.
24 Wires. JAMESBURG TO BORDENTOWN.
Penn. R.R. Co. has three wires on top arm, and all of second arm.
BORDENTOWN
KINKORA
WOODS I. W.
FLORENCE
BURLINGTON
24 Wires BORDENTOWN To CAMDEN.
Penn. R.R. Co. has three wires on top arm, and four on the second arm.
24 Wires. B&O line near and continues RR to comes on Pavonia Camden.
DELMAR
PAVONIA
CAMDEN
PHILADELPHIA
Sub Marine Cable Crossing
UNITED RAILROADS OF NEW JERSEY.
Route of the U.RRs. of N.J.
W. Union Pole Lines.

No. 367
W. U. Tel. Co. } p. 56
Penna RR }

57 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Robert C. Clowry, being duly sworn, says he is president of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

——.

Sworn to before me this — day of —— 1902.

——.

EXHIBIT No. 1.

(Ten cent revenue stamp.)

POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *Feb'y 17th*, 1899.

I, Perry S. Heath, acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department:

In testimony whereof, I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the city of Washington the day and year above written.

PERRY S. HEATH,
Acting Postmaster-General.

[SEAL.] B. W. T.

Annexed to the foregoing is the following, to wit:

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway, New York.

JUNE 5TH, 1867.

Resolved, That this company does hereby accept the provisions of the act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the secretary be and is hereby
58 authorized and directed to file this resolution with the Postmaster-General of the United States, duly attested by the signature of the acting president of the company, and the seal of the

corporation in compliance with the fourth section of said act of Congress.

Adopted unanimously.

[Seal Western Union Telegraph Co.]

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Sec'y W. U. Tel. Co.

Filed June 8th, 1867.

JOS. H. BLACKFAN, *Chief Clerk.*

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
against
THE PENNSYLVANIA RAILROAD COMPANY and THE NEW JERSEY Railroad and Canal Company, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Belvidere Brooks, being first duly sworn, says that he is a citizen and resident of the State of New York and is general superintendent of the eastern and southern divisions of the Western Union Telegraph Company; that as such general superintendent he is in charge of all the lines of telegraph of that company east of the State line between Ohio and Pennsylvania, south of the Ohio river, and east of the Mississippi river in the United States; that he has been in the telegraph service for the past thirty years in various capacities, as operator and manager, assistant superintendent, and general superintendent, and in these various capacities has had experience in the construction, reconstruction, maintenance and operation of telegraph lines; and has learned and knows the cost and value of such lines; that the lines of telegraph along the various lines
59 of railway owned, controlled and operated by the Pennsylvania Railroad Company have been under the supervision and control of the affiant as general superintendent since on or about the 1st day of May, 1902; that he has personally inspected most of said lines and has, in his official capacity as general superintendent received reports of inspection of all of said lines from time to time and knows from said official reports and from his inspection of said lines the condition, capacity and value of the said lines and the character of the business that is transacted on and over said lines and each of them, the connections of said lines, and the relations of said lines to the other lines in the system of telegraph lines of the Western Union Telegraph Company as operated by it from its central office in the city of New York. That he has personally inspected the lines involved in the above-entitled action situated within the State of New Jersey and knows the general

condition of the same and the connections of the same and the business conducted upon and for the same; that the said lines involved in the above-entitled action connect with through lines on the lines of railway of the defendant Pennsylvania Railroad Company reaching to Philadelphia and thence to Baltimore and Washington and points beyond on the south and through Philadelphia to Harrisburg, Pittsburg, and points beyond on the west, the same being operated as a continuous and connected system of telegraph lines, and that the said lines are constructed, maintained, and operated as such continuous and connected lines of telegraph; that affiant knows and is able to state the reasonable and fair value of the physical property constituting said system of telegraph lines as the same now stands and exists along and upon the lines of railway owned, controlled, and operated by the Pennsylvania Railroad Company and referred to and included in the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company dated September 20th, 1891, attached to the bill in the above-entitled cause as Exhibit 1; that the poles, wires and physical property constituting the said lines of telegraph as they now stand and are operated and maintained along and upon the said lines of railway are of the value of one million, two thousand dollars ($1,002,000.00); that affiant, from his experience in the construction, operation and maintenance of telegraph lines, knows the value of the materials and property composing the said lines of telegraph, both new and second-hand, and is able to state from his knowledge and experience the value of said lines when taken down and removed from the said
60 lines of railway owned, controlled or operated by the Pennsylvania Railroad Company and included within the said contract exhibit; that the said lines of telegraph taken down and removed from the premises of the said railroad company would not exceed in value one hundred and seventy-five thousand dollars ($175,000.00); that affiant has had experience in the construction, maintenance and operation of telegraph lines along and upon lines of railway and that such construction, maintenance and operation of telegraph upon lines of railway is universal throughout the United States affiant knows from experience and observation the extent of interference by telegraph lines with the ordinary travel upon said railways, and telegraph lines constructed, maintained and operated as the lines of the Western Union Telegraph Company are maintained and operated along and upon the railway lines owned, controlled or operated by the Pennsylvania Railroad Company, as hereinbefore described, do not interfere with the ordinary travel upon said lines of railway, and that the said lines of telegraph can continue to be so maintained and operated as not to interfere with the ordinary travel upon and operation of said railways; that in the maintenance of telegraph lines along and upon railways it is customary and usual from time to time, in case of change of tracks or a location of tracks or of making of additional tracks, to shift a portion of the poles to accommodate the said changes in the tracks

or structures of the railway, and that this is well understood by railway and telegraph managers, and that with such changes made in the said telegraph lines, poles, and wires, it is entirely practicable to accommodate the said telegraph lines to the daily operation of said railways without any interference herewith or with the travel thereon and that the said presence of said telegraph lines along and upon said railways will not interfere with the operation of said railways in any manner.

Affiant further says that he knows the situation and value of the physical property composing the lines of telegraph within the district of New Jersey referred to in the foregoing suit, which form a part of the lines hereinbefore described and connected with and operated as a part of the same; that the value of the said physical property of the lines in the district of New Jersey under the jurisdiction of this court and involved in the above-entitled action, as the said lines now stand, and are operated, is of the value of three hundred and forty-five thousand dollars ($345,000.00); and that the
61 value of the said physical property in said lines removed from the premises of the said railway company would be of the value of not to exceed fifty-five thousand dollars ($55,000.00); and that the said lines can be maintained and operated along and upon the lines of railway as hereinbefore described without interference with the ordinary travel upon or the operations of said railways or any of them.

Affiant further says that he knows the amount of telegraph business that is being transacted over and upon said lines for the public and for the Government of the United States and that said lines are at all times taxed to their utmost capacity to enable the telegraph company to discharge its duty to the public and the Government of the United States in the transmission of messages and telegraphic despatches for the public, and that the cutting of said lines out of the system of the Western Union Telegraph Company on the first day of December, 1902, as contemplated by the notice given by the Pennsylvania Railroad Company would result in depriving the public and the Government of the United States of facilities that are now being used and that the Western Union Telegraph Company would not then be able, notwithstanding the utmost diligence and effort made by it for the past six months, to provide facilities to accommodate the public — to afford other facilities to equally accommodate the public business.

That he has read paragraph 26, 27 and 28 of the bill in the above-entitled action, and that the allegations thereof in respect of the matters referred to in the foregoing affidavit are true. That in addition to the damages to the physical property of the *telegraph company to the business of the said company are in-* telegraph company by the cutting down and removal of said lines, the damages to the business of the said company are incapable of direct estimate, but they are very great and not capable of being compensated for in damages.

BELVIDERE BROOKS.

Sworn to before me this 22d day of November, 1902.

CHARLOTTE A. VAN BRUNT,
[L. S.] *Notary Public, Kings County, No. 4.*

Certificate filed in New York county.

62 United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants.
} On Bill, &c.

Order to Show Cause.

(Filed November 22, 1902.)

On reading and filing the bill of complaint in the above entitled cause, and the affidavits annexed thereto,

It is, on this twenty-second day of November, A. D. nineteen hundred and two, ordered that the defendants The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company show cause before this court, at a session thereof to be held at the post-office building in the city of Trenton, on Monday, the eighth day of December, nineteen hundred and two, at ten thirty o'clock in the forenoon, why a preliminary injunction should not issue according to the prayer of the said bill of complaint.

And it is further ordered that in the meantime, and until the further order of this court, the said defendants and each of them, their servants, agents and employés, do desist and refrain from cutting down or removing, or in any manner interfering with the maintenance and operation of the complainant's lines of telegraph, or any of them, now standing, existing and being on the several railroads of the said defendants, or either of them, described in the said bill of complaint.

And it is further ordered that a copy of this order and of the said bill of complaint (neither of which need be certified) be served upon the said defendants within three days from the date hereof.

ANDREW KIRKPATRICK, *Judge.*

63 In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD and CANAL COMPANY.

Affidavit of Charles E. Pugh.

(Filed December 18, 1902.)

Charles E. Pugh, being duly sworn, deposes and says:

1. I am the second vice president of the Pennsylvania Railroad Company and as such have immediately under my supervision the operation of the company's railroad system. I have been connected with the railroad company for upwards of forty years and am thoroughly familiar with its past and present use of the right of way of the railroads belonging to the United New Jersey Railroad and Canal Company, of which the Pennsylvania Railroad Company is the lessee, and with the probable extent of its future use thereof. I have also had considerable familiarity for many years with the nature and extent of the telegraph wires and poles which have been used in connection with said railroads.

2. On or about the twentieth day of September, 1881, a contract for the term of twenty years from its date was entered into between the Western Union Telegraph Company and the Pennsylvania Railroad Company, of which a copy, marked "Exhibit A" is hereto attached. This contract was entered into by the railroad company in order that it might be enabled to secure telegraphic facilities necessary to it in and about the transaction of its business, which it was not able properly and sufficiently to secure by a line of telegraph wires and poles owned by and operated exclusively by itself. By said contract it secured a considerable revenue to itself and was also enabled to secure telegraphic facilities requisite in the transaction of its business as above stated.

3. Under said contract a line of poles has been maintained by the Western Union Telegraph Company, which covenanted to remove the same after receipt of a notice as to removal as in and by said contract is specified. Operations under the same convinced the officers of the railroad company that it would be safer and
64 better for it, in the proper transaction of its business of transportation, to reserve to itself the ownership of any poles which under any new contract might be erected. Danger to persons and to property transported on the railroad is involved in the construction and maintenance on its line of a line of telegraph poles and wires not under the control of the railroad company. It is necessary that it shall, from time to time, be able to make such changes

in the location and construction of the poles and wires as it shall find necessary for safety and convenience.

The Western Union Telegraph Company, under said contract, has constructed and operated on the line of the railroad such a line of poles, on which are fastened arms or cross-bars, on which latter the wires are strung. The ordinary width of these cross-bars is about seven feet, eleven inches. Where the pole is so located as to bring the whole of the cross-bar within the line of the right of way of the railroad, it is necessarily located about four feet from the edge. Poles can be located upon the extreme edge of the right of way only when used in connection with cross-bars on one side thereof. In this case the cross-bar would project beyond the pole over the right of way about seven feet, eleven inches. In case of storm of snow or ice, danger to persons and property transported on the railroad thereunder will necessarily be involved in the latter mode of construction. I do not approve of such mode. At certain places along the line of our railroad, especially at curves, the poles require bracing. This can be done either by guy wires or ropes, or by other poles or appliances anchored or planted at some distance from the pole, braced against the pole. These guy wires, ropes or bracing poles necessarily occupy a considerable portion of the right of way.

For many years the railroad company has operated in its business exclusively its own line of wires and poles also located on the right of way.

4. The aforesaid contract having terminated by reason of the expiration of the term specified therein, the railroad company, pursuant to the terms of the contract, on or about the sixteenth day of May, 1902, notified the Western Union Telegraph Company to remove its poles within six months from the first day of June, 1902. By virtue of the expiration of the term of twenty years specified therein, said contract was terminated and the Pennsylvania Railroad Company was at liberty to enter into such other contracts with such other telegraph companies as it should find necessary. It was necessary for it to enter into some contract by which it would be enabled to secure for itself requisite telegraph facilities for the proper conduct of its business not procurable solely through the use of its own line of telegraph wires and poles.

5. On or about the twenty-fifth day of June, 1902, it entered into a contract with the Postal Telegraph Cable Company, a corporation engaged in the business of interstate and other telegraphing similar to that conducted by the Western Union Telegraph Company, by means of which it reserved to itself the entire ownership and control of all the telegraph poles which shall be constructed upon the right of way, together with such additional telegraph facilities as it deemed necessary for its purposes. A copy of this contract, marked "Exhibit B" is hereto attached. Both of the parties thereto are about to enter upon the performance of its conditions.

Under this contract the railroad company will have the entire control of the location, erection and maintenance of telegraph poles upon the right of way, and will be enabled to shift the same from

time to time in such way and manner as it shall deem necessary in the proper conduct of its business of transportation.

The pecuniary benefits which will result to the railroad company from this contract will be large. It is difficult to estimate the same, but it is believed that the benefits it will derive under said contract, properly applicable to the portion of its system now sought to be appropriated by the Western Union Telegraph Company, will amount at once nearly to seventy-five thousand dollars per annum, and that the value of such benefit will annually increase largely.

6. After receipt of the notice given to it, the Western Union Telegraph Company removed its instruments from the depots and stations of the railroad company and is now doing its business in other places by it established near the same.

7. I believe, and therefore aver, that the Western Union Telegraph Company could readily have made, after the receipt by it of notice of removal, such other arrangements as would have enabled it to conduct its whole business fully and completely by means of wires and poles located outside of the railroad right of way.

I aver that there is no necessity for any appropriation by the Western Union Telegraph Company of any portion of the right of way of the railroad company. It can transact its whole business of telegraphing, interstate and within the State, without
66 any appropriation of any portion of said right of way. Nearly all, if not all, the cities and towns located along the system of the Pennsylvania Railroad Company in the State of New Jersey are connected by roads and highways along which the Western Unoin Telegraph Company has either already directly or through its affiliated companies, erected lines or wires or poles, or along which it can erect the same at no extraordinary expense. If it possesses the right of eminent domain which it claims for itself or for its affiliated or controlled companies, it can easily procure such right of way as does not exist along said roads and highways.

I believe, and therefore aver, that the Western Union Telegraph Company is now able to inaugurate, with little or no delay and with no extraordinary expense, a line or lines of wires and poles amply sufficient for all its purposes.

I believe, and therefore aver, that one of the purposes of its present proceeding is to embarrass the Pennsylvania Railroad Company, which has severed its contract relations with it, in carrying out the contract it has entered into and which it has been necessary for it to enter into with the Postal Telegraph Cable Company.

8. The Postal Telegraph Cable Company, upon the removal by the Western Union Telegraph Company of its line of poles now located upon the right of way of the railroad company, will be enabled at once to do for the Pennsylvania Railroad Company the business of telegraphing necessary for the latter, over the wires which it will string upon the poles the Pennsylvania Railroad Company is ready to erect immediately.

If the doing of what is necessary to carry out the contract with the Postal Telegraph Cable Company be interfered with or delayed,

very great injury will result to the railroad company and it will be put to very great inconvenience in and about the transaction of its business.

It is necessary to construct the new line of poles required to be constructed under the said contract with the Postal Telegraph Cable Company in about the same location as that of the line of poles belonging to the Western Union Telegraph Company which it has been notified to remove on or before the first day of December, 1902.

Outside of this location, there is no other part of the right of way of the railroad company which can be used without most serious injury to its business. The construction of a line of poles and wires in any other than said location would deprive the railroad
67 company of the use of a portion of its right of way absolutely required by it for use, and by it in actual use, or absolutely needed for necessary use in the immediate future, in and about its business of transportation. Such construction would interfere with the ordinary travel on and transportation along said railroad.

9. The right of way belonging to the United New Jersey Railroad and Canal Company of its entire width, is absolutely necessary for it in and about its business, and is in actual use by it or absolutely needed for necessary use in the immediate future. No portion of said right of way can be devoted to any other purpose without great injury to it, or without interference with the ordinary travel, or without ireparable damage.

As I have already said, the railroad company requires for its purposes certain telegraph facilities additional to those possessed by it. These it can only procure by means of the additional line of wires and poles concerning which it has contracted with the Postal Telegraph Cable Company. Both lines of poles, as I have said, should be in its own ownership and under its own control. In no other way can it properly insure such changes of location and construction as from time to time will be necessary. The location and construction of these two lines of wires and poles leave no space whatever upon the right of way which is not presently used or necessary to be used by it.

At many places the whole right of way is completely occupied by lines of tracks and the necessary intervening spaces. From time to time it will be necessary for the railroad company, in many other places, to increase the number of its tracks.

The appropriation to the use of a telegraph company of any portion of the right of way would hamper irretrievably the railroad company in the necessary straightening, changing and increasing of the number of its tracks.

From time to time during the last twenty years the railroad company has found the right of way entirely inadequate in width for its business purposes, and has been obliged to widen the same at a very great expense. It will doubtless be necessary for it in the future, from time to time, to acquire additional lands. Its present right of way is inadequate in many places for its present purposes,

and will be increasingly inadequate from time to time in many additional places.

10. An injunction restraining the railroad company from compelling the removal by the Western Union Telegraph Company of its poles in accordance with the notice the latter has received,
68 would prevent the carrying out at once of the Postal Telegraph Cable Company's contract, and would expose the railroad company to incalculable inconvenience in the transaction of its business.

11. It is more than probable that the railroad company from time to time will be able only by securing a greater width of right of way by acquiring additional ground, to allow the continued location upon it of the line of wires and poles for which provision has been made under the contract with the Postal Telegraph Cable Company.

12. There will be no room upon the two lines of poles which will be erected, one for the exclusive use of the railroad company and the other, under the contract with the Postal Telegraph Cable Company, for the wires of any other company.

13. At all places along the line of the Pennsylvania Railroad system between Jersey City and Trenton there are two tracks. At most places there are four, and in many places a considerably greater number. The width of the track is about four feet, eight inches; for safe railroad business there must be between and on each side of each line of track, a space of seven feet, and all new construction provides for eight feet.

CHAS. E. PUGH.

Sworn and subscribed before me, a notary public of the Commonwealth of Pennsylvania residing in the city of Philadelphia, this 17th day of December, 1902.

HIRAM H. POTTS,
Notary Public.

Commission expires February 26th, 1905.

"EXHIBIT A."

(288 A.)

Agreement between the Pennsylvania Railroad Company and the Western Union Telegraph Company, Dated September 20th, 1881.

This agreement, made the twentieth day of September, anno Domini one thousand eight hundred and eighty-one, between the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, hereinafter for brevity designated as the railroad
69 company, and the Western Union Telegraph Company, a corporation of the State of New York, hereinafter for brevity designated as the telegraph company, witnesseth:

First. Said railroad company hereby grants, to the extent of its corporate power so to do, to the said telegraph company, a right to place, maintain and use upon the line of the right of way of the Pennsylvania railroad, and of the railroads owned, operated, or leased by it, or in which it is otherwise interested, as enumerated in the schedule hereto attached, marked "A," and made part of this agreement, a single line of telegraph poles, except where two are hereinafter authorized, with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company, or such other officer as the railroad company may designate for that purpose: *Provided*, That the location of any of the telegraph company's poles shall, from time to time, be changed from one point to another on the railroad right of way at the expense of the telegraph company, in such manner as the general manager, or other proper officer of the railroad company may direct, so as not to interfere with the operations of the railroad: *Provided, however*, That the telegraph company shall have the right to maintain two lines of poles and such number of wires as it may deem necessary, on the south side of the main line of the railroad company's railroad between Jersey City and West Philadelphia, it being understood that the railroad company may require and permit the telegraph company either to put its wires under the railroad right of way, or remove them from said right of way through the various cities, towns or villages, or any of them, between West Philadelphia and Jersey City, including both of those cities, the telegraph company reserving the right to elect whether it shall put its wires under the railroad right of way or transfer them to other routes. The telegraph company shall have the right to maintain, renew and repair its underground line now running through the property of the railroad company in Jersey City. And should additional corporate action upon the part of any of the corporations controlling the roads named in "Schedule A," hereto attached, be necessary to cover the lines therein named, the railroad company will also endeavor to procure such corporate action upon the part of such corporations.

Second. Said railroad company also grants to said telegraph company the right to lay down and maintain submarine cables, and to connect the same on the shores of any stream with the land poles or wires of the telegraph company, on the rights of way and grounds of the railroad company, in such locality, and in such manner, under the direction of the general manager aforesaid, or such other officer as the railroad company may designate for that purpose, as shall not interfere with the operations of the railroad.

Third. Said railroad company reserves to itself the option of determining whether the telegraph company may place a wire or wires, in addition to those provided for in the seventh clause hereof, upon the poles of the railroad company, upon any or all of the lines embraced in said schedule, the telegraph company agreeing that if

such privilege be granted to and availed of by it, it will pay to the railroad company for the same, four dollars per mile per annum for each wire placed in pursuance thereof.

Fourth. The railroad company agrees to transport to and from regular stations, free of charge, over said lines of railroad embraced in this contract, the officers and employés of the telegraph company when engaged in building and repairing, equipping, and operating the telegraph lines and wires hereby authorized upon said railroads, and also to transport free of charge to regular stations over said railroads the material to be used in the building or repairing, equipping or operating of said telegraph lines and wires herein authorized to be constructed, maintained, or operated on the railroads named in Schedule A; the telegraph company hereby agreeing that it will hold harmless and indemnify the said railroad company against all responsibility for damages, costs, or expenses that may be incurred or recovered for any injury by accident or otherwise to any person or property transported free under the terms of this agreement.

Fifth. The railroad company agrees that it will not hereafter grant the right to any other party or telegraph company to erect, maintain, or use poles or wires upon the right of way, or the buildings, bridges, or other structures or fixtures connected with the right of way of any of the railroads embraced in this agreement, unless such other party or telegraph company shall pay annually for such right in money an amount equal to the total annual money compensation herein agreed to be paid by the telegraph company, to wit, seventy-five thousand dollars per annum.

If under the terms of this agreement, the railroad company shall hereafter grant to any other party or telegraph company the
71 right to erect poles with wires thereon, the railroad company shall have the right, anything in this agreement contained to the contrary notwithstanding, to make the same terms, or terms which in the opinion of the railroad company's board of directors will be equally favorable, with such party or telegraph company, as to receiving and transmitting messages for the public, as are made with the Western Union Telegraph Company in the ninth article of this agreement. The provisions of this section not to apply to underground lines of wire.

Sixth. The telegraph company agrees to pay annually to the railroad company during the continuance of this agreement for the privileges granted in the first and second clauses hereof, whether the same be availed of or not, the sum of twenty-five thousand dollars ($75,000) in monthly installments of six thousand two hundred and fifty dollars ($6,250) each, upon the twentieth day of each month, the year to begin on the twentieth day of September, 1881, and the first payment to be made on the twentieth day of October, 1881, and also to sell, transfer and deliver over to the railroad company as an additional compensation for the privileges hereby granted, the entire line of poles as it now exists on the north side of the railroad company's railroad, between Jersey City and Kensington (except

through Marion, East Newark, Newark and Rahway), and also six of the best number eight or nine gauge continuous wires now upon said poles, and on the poles of the telegraph company through said excepted places, and two additional like wires upon the poles of said telegraph company on the south side of said road from Philadelphia to Jersey City, the existing poles and wires so to be delivered to the railroad company, being of an estimated value of forty-one thousand dollars ($41,000), with the agreement that any wires in excess of the six wires upon the poles on the north side of the said road so to be transferred to the railroad company shall remain thereon until they can be removed by the telegraph company, which shall not be later than one year from date: *Provided, however*, That the telegraph company may leave and continue on said poles two wires, as provided for in section seventh.

Seventh. The telegraph company hereby grants the right to the railroad company to place two of its wires upon the poles and in the cable houses of the telegraph company without charge, and also the right to place, from time to time, additional wires necessary for the business of the railroad company upon any of the poles and in the cable houses of the telegraph company on said lines of
72 railroad, upon the payment by the railroad company of four dollars per mile per annum for each of such additional wires; and the railroad company hereby grants the right to the telegraph company to place two of its wires upon the poles and in the cable houses of the railroad company without charge. The telegraph company will furnish at cost, or the railroad company may furnish at its own expense, cable conductors for connection with the railroad company's wires.

Eighth. The telegraph company agrees to transmit over its wires for the railroad company, during the continuance of this agreement, with the same promptness, efficiency, and dispatch as it does for any other party, for the sum of fifteen thousand dollars ($15,000) per annum, payable in equal monthly installments of one thousand two hundred and fifty dollars ($1,250) each, all messages pertaining to the business of said railroad company, or of any of the companies whose lines are included in Schedule A and covered by this agreement, or any message relating to its business sent by an officer of either company as embraced in said schedule, to and from all points on the lines of said telegraph company throughout the United States and the British provinces, now erected or which may hereafter be erected, as well as upon any lines which the said telegraph company may now or hereafter during the continuance of this agreement secure the use of by purchase, lease, or otherwise in the United States or the British provinces.

The transmission of messages for the railroad company or any of the companies whose lines are included in Schedule A, and the transportation of employés of the telegraph company, as hereinbefore provided, shall be authorized by franks or passes to be issued by each party to the other, upon application of a properly authorized officer of the party requiring such service.

Ninth. At all telegraph stations of the railroad company, upon the lines of said railroads, the railroad company shall, at its option, have the right to receive, transmit, and deliver messages for the public, and if such messages be sent over the telegraph company's wires—the right so to forward them being hereby given to the railroad company—it shall be at the tariff rates of the telegraph company. The operators of the railroad company receiving, forwarding, and delivering messages so interchanged between the telegraph company's and the railroad company's lines, shall be considered as acting as the agents of the telegraph company, and such operators shall remit all receipts for such messages to the telegraph company, which company shall furnish to the railroad company a monthly statement thereof, and the telegraph company agrees to pay monthly to the railroad company one-half of the cash receipts for such service, after deducting all tolls on ocean cable messages and tolls belonging to lines of other companies paid on such messages, which shall be retained in full by the telegraph company. If the railroad company grant the right to any other telegraph company to have an office or offices in any of the depots or buildings of the railroad company, the same privilege in the same depot or building shall be granted to the Western Union Telegraph Company on as favorable terms and with as favorable location as shall be granted to said other company.

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Tenth. The railroad company shall have the right to the free use of any telegraphic patent rights, or new discoveries, or inventions that the telegraph company now owns, uses, or controls in its general telegraph business, or which it may hereafter own, use, or control as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

Eleventh. The telegraph company agrees that, as a part of the service for which it is to receive the allowance of fifteen thousand dollars ($15,000) under article eighth of this agreement, it will receive and transmit cable dispatches on the business of any of said railroad companies to Europe and other foreign countries, aggregating at current rates the sum of one thousand dollars ($1000) per annum, the railroad company agreeing to pay any excess on cable messages over that amount in each year.

Twelfth. Neither the general terms of this agreement, nor any stipulation contained herein, shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the railroad company, or any other company whose action it may procure, and in favor of the telegraph company, as against the owner of the fee simple of the land over which the railroad or other company has the right of way, nor as against the exercise of the power of eminent domain upon the part of any other company possessing it by grant from the Commonwealth or State creating such corporation; *And it is further agreed*, That if anything herein contracted to be done, or not to be done, shall be held to be invalid for want of corporate or legal authority to make an agreement to

such an extent, it shall not give to either party any claim for damages by reason of an excess or defect of corporate or legal authority in so doing.

Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding
74 upon the respective companies, their successors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing: *Provided*, That if before the expiration of said twenty years the railroad company shall, from any cause, cease to own, operate or control any or either of the railroads enumerated in Schedule A, without having procured the corporate assent to this agreement of the proprietary corporation, this agreement shall become inoperative as to such railroad or railroads after the railroad company shall cease to own, operate or control the same, and in such event, the annual payment provided for in the sixth section hereof shall be reduced in such proportion not exceeding the mileage of the railroad or railroads so ceased to be owned, operated or controlled, as may be agreed upon between the parties hereto; and in case they cannot agree, such proportion as may be fixed by the arbitrators as per article eighteenth of this agreement.

Fourteenth. It is a condition of this agreement that the railroad company is not to be responsible for, and the telegraph company hereby covenants and agrees to save the railroad company harmless, and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company, while being carried free over any of said railroads under this agreement; and the telegraph company shall not be responsible for, and the railroad company agrees to indemnify and save harmless the telegraph company against any loss or damages of any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the railroad company under this agreement.

The telegraph company hereby assumes all responsibility for damages resulting from errors, failures, delays, or other defaults or mishaps in the transmission or delivery of messages occasioned by the fault of persons employed directly by it; and the railroad company hereby agrees to pay one-fourth (¼) the amount of any damages, costs, or legal expenses which may be recovered against or incurred by the telegraph company on account of any errors, failures, delays, or other defaults or mishaps in the receipt, transmission, or delivery of messages, occasioned by the fault of persons employed by the railroad company, and acting as agents of the telegraph company, in the transaction of commercial or public telegraph business, the telegraph company agreeing to pay the remaining three-fourths (¾).

75 Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered, to the treasurer, or an executive officer of the party in default, or if any

other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfillment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due or for damages for non-fulfillment of such covenant or of any other covenant.

Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: *Provided, however*, That the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same.

Seventeenth. All and all manner of contracts, engagements, or arrangements whatsoever hitherto made between said railroad company or any of the companies named in Schedule A hereto attached, or any company merged or consolidated with the companies therein named and the said telegraph company or any other company or companies, whose stock or lines may be owned or controlled by said telegraph company or made with other telegraph companies or individuals, and assigned and transferred to or owned or claimed by said telegraph company for or in respect to the right of way over the railroads embraced in the schedule hereto attached, are hereby cancelled and declared to be void and of none effect as between the parties hereto and thereto, and all and all manner of claims arising thereout, whether in suit or otherwise, are hereby terminated and settled, and the parties mutually released therefrom, and the parties complainants in any such suits agree to discontinue the same, each party agreeing to pay its own costs. This
76 not to release any money actually due by either party to the other for rent or services rendered under said contracts.

Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination.

Eighteenth. In case of any difference of opinion between the parties hereto in relation to any of the provisions of this agreement, the

matter in dispute shall be referred to two arbitrators, one of whom shall be appointed by the railroad company and the other by the telegraph company, and if the two referees so chosen cannot agree, then the two so selected shall select a third like disinterested and competent party, and the decision of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto; but if either of the parties hereto fail or refuse after ten days' written notice from the other to select a referee as aforesaid, then the party not in default shall select a referee as aforesaid for the party so failing or refusing to select, and the said two referees so selected if unable to agree shall select a third like referee, and the three so chosen, or a majority of them, shall proceed as hereinbefore mentioned, and the award of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto.

In witness whereof, the parties to these presents have caused the names of their respective presidents to be hereunto subscribed and their corporate seals to be attested, the day and year first above written.

THE PENNSYLVANIA RAILROAD COMPANY,
By G. B. ROBERTS, *President.*

[Seal of the Penna. R. R. Co.]

Attest: JNO. C. SIMS, JR., *Secretary.*

77 THE WESTERN UNION TELEGRAPH CO.,
By NORVIN GREEN, *President.*

[Seal of the W. U. Tel. Co.]

Attest: A. R. BREWER, *Secretary.*

SCHEDULE A.

Philadelphia and Columbia railroad—West Philadelphia to Columbia, Pa.
Pennsylvania railroad—Harrisburg to Pittsburg, Pa.
Schuylkill River branch Pennsylvania railroad—Haverford street to Arsenal bridge.
Delaware extension Pennsylvania railroad—Arsenal bridge, West Philadelphia, to Dock Street depot.
Frazer branch—Frazer to near Woodland.
Columbia bridge—Over Susquehanna river at Columbia, Pa.
York branch—West end Columbia bridge to York, Pa.
Tyrone branch—Tyrone to junction Bald Eagle Valley railroad at Vail Station.
Hollidaysburg branch—Altoona to Hollidaysburg, with branch from Duncansville to Portage iron works.
Morrison's Cove branch—Hollidaysburg to Henrietta, Pa., with branch to Martinsburg.

Bloomfield branch—Roaring Spring to Ore Hill, Pa.
Williamsburg branch—Hollidaysburg to Williamsburg, Pa.
Springfield branch—Springfield Junction to Ore Mines.
Indiana branch—Blairsville Intersection to Indiana, Pa.
Port Perry branch—Pennsylvania railroad near Brinton's, to Pittsburg, Virginia and Charleston railroad at Thomson.
Hudson River ferries—New York city to Jersey City, across Hudson river.
New Jersey railroad—Hudson river, at Jersey City to point 3½ miles west of New Brunswick, N. J., with branches from Harsimus Junction to pier No. 3; East Newark to Market street, Newark, and Metuchen to Bonhampton.
Trenton branch Camden and Amboy railroad—3½ miles west of New Brunswick to east end of Trenton Delaware bridge, with branches from Princeton Junction to Princeton, and Monmouth Junction to Kingston.
78 Perth Amboy and Woodbridge railroad—Rahway to Perth Amboy, N. J.
Millstone and New Brunswick railroad—New Brunswick to East Millstone, N. J.
Rocky Hill and Kingston railroad—Kingston to Rocky Hill, N. J.
Camden and Amboy railroad, main line—Camden to South Amboy, with branches from Bordentown to Trenton, and Jamesburg to Monmouth Junction.
Pemberton and Hightstown railroad—Pemberton to Hightstown, N. J.
Burlington and Mt. Holly railroad—Burlington to Mt. Holly, N. J.
Mt. Holly, Lumberton and Medford railroad—Mt. Holly to Medford, N. J.
Camden and Burlington County railroad—Camden to Pemberton, N. J.
Vincentown branch of Burlington County railroad—Ewansville to Vincentown, N. J.
Belvidere Delaware railroad—Trenton to Manunka Chunk, with branch from Coalport to Millham.
Flemington railroad—Lambertville to Flemington, N. J.
Trenton Delaware bridge—Over Delaware river, from Trenton, N. J., to Morrisville, Pa.
Philadelphia and Trenton railroad—West end of Trenton Delaware bridge, at Morrisville, Pa., to Kensington Station, Philadelphia, with branch on Tioga street to Delaware river.
Frankford and Holmesburg railroad—Holmesburg Junction to Bustleton, Pa.
Connecting railway—Philadelphia and Trenton railroad at Frankford Junction, to Mantua Junction, on Pennsylvania railroad.
West Chester railroad—Near Woodland to West Chester, Pa.
East Brandywine and Waynesburg railroad—Downington to New Holland, Pa.
Pomeroy and State Line railroad—Pomeroy, Pa., to Philadelphia, Wilmington and Baltimore Railroad intersection, Del.

Hanover and York railroad—York to Hanover, Pa.
Littlestown railroad—Hanover, Pa., to Maryland State line, near Kingsdale.
79 Frederick and Pennsylvania Line railroad—State line, near Kingsdale, to Frederick, Md.
Harrisburg, Portsmouth, Mt. Joy and Lancaster railroad—Dillerville to Harrisburg, with branch from Middletown to Columbia, Pa.
Philadelphia and Erie railroad—Erie to Sunbury.
Sunbury, Hazelton and Wilkesbarre railroad—Sunbury to Tomhicken, Pa.
Mifflin and Centre County railroad—Lewistown Junction to Milroy, Pa.
Lewistown and Tuscarora bridge—Over Juniata river, at Lewistown, Pa.
Sunbury and Lewistown railway—Lewistown borough to Selinsgrove Junction, N. C. railway.
Bedford and Bridgeport railroad—Mt. Dallas, Pa., to Maryland State line, with branch on Dunnings creek.
Bald Eagle Valley railroad—Vail Station to Lock Haven, Pa.
Tryone and Clearfield railway—Vail Station to Curwensville, Pa., with branches to coal mines.
Lewisburg and Tryone railroad—Tryone to Pennsylvania Furnace, and Montandon to Spring Mills.
Lewisburg bridge—Over Susquehanna river, at Lewisburg, Pa.
Newry railroad—Portage iron works to Newry, Pa.
Ebensburg and Cresson railroad—Cresson to Ebensburg, Pa.
South-west Pennsylvania railway—Junction, near Greensburg, to Fairchance, Pa., with branches to coal mines.
West Pennsylvania railroad—Blairsville to Allegheny City, with branch to Butler, Pa.
Pittsburg, Virginia and Charleston railway—South Side, Pittsburg, to Bell Vernon.
Freehold and Jamesburg Agricultural railroad—Jamesburg to Sea Girt, N. J.
Pemberton and Sea Shore railroad—Pemberton Junction to Whiting's N. J.
Columbus, Kinkora and Springfield railroad—Kinkora to New Lisbon, N. J.
Florence Branch railroad—Florence, N. J., to Wood's iron works.
Camden and Philadelphia steamboat ferry—Camden, N. J., to Philadelphia.
West Jersey railroad—Camden to Cape May, N. J., with branch from Glassboro to Bridgeton.
80 West Jersey and Atlantic railroad—Newfield to Atlantic City.
Swedesboro railroad—Woodbury to Swedesboro, N. J.
Salem railroad—Elmer to Salem, N. J.
Columbia and Port Deposit railroad—Columbia, Pa., to Port Deposit, Md.

Cumberland Valley railroad—Harrisburg to Potomac river, at Powell's Bend, Md.
Dillsburg and Mechanicsburg railroad—Mechanicsburg to Dillsburg, Pa.
Mont Alto railroad—Junction near Chambersburg, to Waynesboro, Pa.
Southern Pennsylvania railroad—Junction near Marion, to Richmond, Pa.
Martinsburg and Potomac railroad—Potomac river, at Powell's Bend, to Martinsburg, W. Va.
Northern Central railway—Baltimore, Md., to Sunbury, Pa., with branches to Green Spring and Canton, Md.
Elmira, Jefferson and Canandaigua railroad—Watkins to Canandaigua, N. Y.
Chemung railroad—Horse Heads Junction, Erie railway, to Watkins, N. Y.
Elmira and Williamsport railroad—Williamsport, Pa., to junction with Erie railway, near Elmira, N. Y.
Shamokin Valley and Pottsville railroad—Sunbury to Mt. Carmel, Pa., with branch to Hickory Ridge colliery.
Summit Branch railroad—Millersburg to Williamstown, Pa
Baltimore and Potomac railroad—Baltimore, Md., to south end Long bridge, Washington, D. C., with branch from Bowie to Pope's creek.
Alexandria and Washington railroad—South end Long bridge to Alexandria, Va.
Alexandria and Fredericksburg railroad—South end Long bridge to Quantico, Va.
Bellefonte and Snow Shoe branch—Milesburg to Bellefonte, Pa.
Allegheny Valley railroad—Pittsburg to Oil City, and Red Bank to Driftwood, with branches.

81 "EXHIBIT B."

(795.)

Agreement Between Postal Telegraph-Cable Company and the Pennsylvania Railroad Company, Dated June 25th, 1902.

For the transaction of a commercial telegraph business over the railroad lines named herein.

This agreement, made and entered into this twenty-fifth day of June, 1902, by and between the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York, party of the first part, and the Pennsylvania Railroad Company, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, party of the

second part, hereinafter for convenience referred to as the telegraph company and the railroad company, respectively, *witnesseth:*

Whereas, the telegraph company operates a telegraph system throughout the United States, and

Whereas, the railroad company owns, maintains and operates or controls the lines of railroad more particularly described in the exhibit marked Schedule A, hereto attached and made a part hereof, and

Whereas, the telegraph company desires the privilege of transacting a commercial telegraph business on and over the lines of railroad of the railroad companies specified in said Schedule A on the terms and conditions hereinafter stated.

Now, therefore, in consideration of the premises and of the covenants and undertakings hereinafter contained on the part of each party to be kept, observed and performed, and for other valuable considerations moving from each of the parties hereto to the other, receipt whereof is hereby acknowledged by each of them, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows:

I. The railroad company hereby grants to the extent of its corporate power so to do to the telegraph company during the period covered by this agreement, the privilege of transacting a
82 commercial telegraph business on and over the lines of railroad of the railroad companies specified in said Schedule A, but the easement herein granted is confined to the transaction of commercial telegraph business only and does not cover the right to furnish or transact telephone service for the public.

For the purpose of enabling the telegraph company to transact commercial telegraph business, the railroad company agrees to furnish upon the rights of way of the lines of railroad named in Schedule A the necessary poles, cross-arms and brackets to which the telegraph company may at its own cost and expense attach in the aggregate not exceeding twelve thousand (12,000) miles of wire, the telegraph company to furnish the said wire, and all necessary insulators therefor, and to make all renewals thereof, the railroad company agreeing to keep said poles in repair, and to furnish the necessary labor to keep said wires in ordinary repair, the telegraph company furnishing the necessary material and insulators therefor. The stringing, renewal and removal of said wires are to be so done as not to interrupt or interfere with the proper working of the railroad company's wires.

II. The telegraph company hereby agrees that it will during the period covered by this agreement efficiently transact a commercial telegraph business on and over the railroads of the said railroad companies. At such points as the railroad companies may elect from time to time, the operators of the railroad company will transact commercial telegraph business, acting as the agents, and conforming to the rules, regulations and instructions of the telegraph company in the transaction of such commercial telegraph business in so far as they do not conflict with the rules, regulations and in-

structions of the railroad company, said operators being paid by the railroad company.

III. The telegraph company shall determine all questions of tariff and shall fix all rates for said commercial telegraph business to and from offices on the telegraph lines of the railroad company, it being understood and agreed, however, that said rates shall in all cases be the same as the rates of other competing telegraph companies, except when the parties hereto shall mutually agree in writing to establish a higher or a lower rate.

IV. For the rights and privileges granted to the telegraph company by this agreement, it is agreed and stipulated that, in addition to all payments required by article VIII of this agreement, the railroad company shall also be entitled to receive payments, which the telegraph company shall make, as follows:

83 (1.) A sum equal to the total tolls and revenues derived from all such commercial telegraph business between railroad company's offices as shall be wholly conducted over wires supplied and owned by the railroad company, and transacted by such operators of the railroad company as shall also be agents of the telegraph company as provided in article II hereof.

(2.) A sum equal to fifty per centum (50%) (except as otherwise provided in section 4 of this article) of the total tolls and revenues derived from all commercial telegraph business (other than that specified in section one of this article), including market quotations, newspaper matter and transatlantic cable messages, whether originating at said railroad company's offices and destined to points beyond said railroad company's lines, or originating beyond said lines and destined to said railroad company's offices; or originating at or delivered from the offices or trains of the railroad company and delivered to the separate offices of the telegraph company upon said railroad company's lines, or originating at such separate offices of the telegraph company and destined to said railroad company's offices which shall remain after deducting from said total tolls the amount which said telegraph company shall be required to pay, or account for, to other connecting lines.

(3.) The telegraph company may maintain and operate independently of the railroad company the telegraph company's offices in the cities and towns named in Schedule B attached hereto, but it agrees that it will not during the continuance of this agreement operate in any other city or town on the lines of railroad of the railroad company an office independent of the railroad company, except with the approval of the railroad company.

It is further understood and agreed, however, that if the telegraph company shall not desire to maintain any or all of its offices now or hereafter established in any of said cities or towns named in Schedule B, it shall have the right to close any or all of said offices, provided, however, that if the telegraph company elects to maintain no offices in any of said cities or towns, it shall give the railroad company thirty (30) days' written notice of its intention to close its separate office or offices in said place. After the expiration of said

thirty days the commercial telegraph business shall be both transmitted and delivered through the railroad company's office or offices at said place in accordance with this agreement if the railroad company so desires and has the necessary facilities therefor, and
84 the telegraph company shall not re-establish an office in said city or town except upon the terms and conditions hereinabove set forth. The telegraph company agrees that it will not except with the approval of the railroad company establish in any of the cities or towns named in Schedule B an office independent of the railroad company within the immediate vicinity of any of the railroad company's stations or offices where commercial telegraph business is transacted under this agreement where the establishing of such office would be likely to detract from the receipts of said office of the railroad company.

(4.) It is further covenanted and agreed that at Jersey City, Philadelphia, Pittsburg, Washington, Baltimore, Harrisburg, and at such other points as may hereafter be agreed upon, the railroad company will furnish at its own expense in its main passenger station the necessary space, heat, and light for the proper accommodation of a telegraph office for the transaction of commercial telegraph business. At such offices the telegraph company will transact a commercial telegraph business at its own expense, paying as rental to the railroad company 40 % of the total tolls on all commercial telegraph business transacted at such offices after deducting the amount which the telegraph company shall be required to pay or account for to other connecting lines.

(5.) On or before the twentieth (20th) day of each month, statements shall be prepared showing all commercial telegraph business transacted under this agreement during the preceding calendar month where the revenue therefrom is to be divided between the railroad company and the telegraph company, and such revenue shall be divided between the parties hereto as hereinbefore provided, and any balance due from either party to the other paid within thirty (30) days thereafter.

V. The telegraph company shall and will at its own expense advertise such offices on the telegraph lines of said railroad company as may be agreed upon as aforesaid, as part of the telegraph company's general system, and shall also at its own expense furnish proper and suitable signs, message blanks and all other forms necessary for the proper transaction of the commercial telegraph business at said offices, and said railroad company agrees that said blanks and forms shall be used and signs displayed at all telegraph offices on its lines at which commercial telegraph business is transacted for the purpose of identifying the commercial telegraph business done at said offices with the said telegraph company's system.

85 VI. It is understood and agreed that the wires which the railroad company may assign for commercial telegraph business shall be connected into the main offices of the telegraph company at the telegraph company's expense wherever and whenever such connections are necessary or desirable for the efficient inter-

change of commercial telegraph business between the parties hereto. Where desired by the railroad company, the telegraph company will give the railroad company the free use of its pole lines or underground lines necessary to enable the railroad company's wires to be connected into the railroad company's offices located in the different cities on its lines or to connect the railroad company's wires into city offices of the telegraph company. The telegraph company agrees to furnish at its own expense the instruments, local batteries and operators necessary at its offices for the proper operation of the railroad company's wires so connected and when said wires terminate in offices of the telegraph company will furnish free the main battery necessary at such offices for the proper operation of said railroad company's wires so terminating. It is further understood and agreed that in the absence of other arrangements between the parties hereto, the interchange point for commercial telegraph business originating at such railroad company's offices and destined to points beyond the said railroad company's lines, or originating beyond said lines and destined to said railroad company's offices, shall be the telegraph office of the railroad superintendent of the division on which the business originates or to which it is destined.

VII. (1.) All messages of the officers, agents and employés of the railroad company pertaining to business of the railroad company between the railroad company's offices shall be transmitted on the wires used by the railroad company.

(2.) The telegraph company agrees to receive, and transmit, over its wires, and deliver, free of charge, for the railroad company during the continuance of this agreement, with promptness, efficiency and dispatch, all messages pertaining to the business of the Pennsylvania Railroad Company or any of the companies whose lines of railroad are included in Schedule A and covered by this agreement, or any messages relating to its business sent by an officer of any company embraced in said schedule, to and from all points on the land lines now or hereafter controlled by it up to the amount of $100,000.00 each year, computed at the regular tariff rates of the telegraph company between the points of origin and destination, the transmission of such messages to be
86 covered by franks or passes to be issued on the application of a duly authorized officer of the Pennsylvania Railroad Company, and the railroad company agrees to pay one-half the regular rates on such messages above the sum of $100,000.00 in each year, the railroad company hereby agreeing to hold harmless and indemnify the telegraph company against loss or damage of any kind arising from any error or failure in the transmission or delivery of messages sent free by the telegraph company for the railroad company under this agreement. Itemized monthly accounts shall be rendered by the telegraph company of such free and half rate messages.

(3.) The telegraph company agrees that, in addition to the free service to be performed by it, under section (2) of this article, it will receive and transmit cable dispatches on the business of any of said railroad companies to Europe and other foreign countries, aggregat-

ing at current rates the sum of one thousand dollars per annum, the railroad company agreeing to pay any excess on cable messages over that amount in each year.

(4.) The railroad company agrees to transport to and from regular stations, free of charge, over said lines of railroad embraced in this contract, the officers and employés of the telegraph company when engaged in building and repairing, equipping and operating the telegraph wires hereby authorized upon said railroads, and also to transport free of charge to regular stations over said railroads the material to be used in the building or repairing, equipping or operating of said telegraph wires herein authorized to be constructed, maintained, or operated on the railroads named in Schedule A, up to the sum of $20,000.00 per annum, but should such transportation exceed the sum of $20,000.00 per annum, the telegraph company shall pay the railroad company one-half its regular rates on all transportation above that sum, the telegraph company hereby agreeing that it will hold harmless and indemnify the said railroad company against all responsibility for damages, costs or expenses that may be incurred or recovered for any injury by accident or otherwise to any person or property so transported under the terms of this agreement. The transportation of employés of the telegraph company to be covered by passes or special tickets to be issued on the application of a duly authorized officer.

VIII. (1.) In consideration of the provisions of this agreement and the privileges hereinbefore granted by the railroad
87 company, the telegraph company agrees in addition to the other payments herein required to be made by it to pay as a rental to the railroad company, in monthly installments on the first day of each month in each and every year during the continuance of this agreement, the minimum sum of $60,000.00 per annum for the first five years from the date of this agreement, the minimum sum of $70,000.00 per annum for the second five years, and the minimum sum of $80,000.00 per annum for the third five years of the period of this agreement.

(2.) It is further covenanted and agreed in order that the railroad company may properly provide the necessary accommodation for the 12,000 miles of wire to which the telegraph company is entitled under this agreement, that the telegraph company shall and will furnish the railroad company a statement showing the number of wires amounting in the aggregate to 12,000 miles and between what points they desire to erect the same, and should the railroad company be unable to accommodate the designated number of wires between the points named on its present lines of poles it shall provide and locate such additional poles as may be necessary for this purpose. After the railroad company has provided the necessary pole accommodation for the said 12,000 miles of wires between the points designated by the telegraph company, no change in the location of said wires (except as provided in section XVI for the removal of said wires) shall be made without permission from the railroad company, and should the telegraph company desire more than

12,000 miles of wire on the poles of the railroad company and the railroad company be in position to provide for the same at a proper and reasonable cost with due regard to efficiency and economy of operation, the railroad company will furnish accommodation for such additional wires upon said poles, the telegraph company paying therefor a yearly rental of $4.00 per mile per wire and $2.00 per mile per wire per year for maintenance.

(3.) The telegraph company agrees that it will indemnify and save harmless the railroad company against any and all loss or damage to the property of the railroad company resulting from the construction, repair, reconstruction and maintenance of the telegraph company's wires upon the railroad company's rights of way and against all claims, payments, suits, judgments and sums of money accruing to any party against the railroad company for loss, damage or injury either to person or estate resulting from the acts or
88 negligence of the telegraph company, its servants or employés, in and about the construction, repair, reconstruction, maintenance and operation of the telegraph company's said wires upon the rights of way of the railroad company.

IX. The telegraph company hereby assumes all responsibility for damages arising from the fault of persons employed directly by it, and also agrees to save the railroad company harmless against any and all claims for loss or damage resulting from errors, delays or other defaults in the transacting of commercial telegraph business under this agreement, and expense in connection therewith, except that wherefrom the railroad company receives a sum equal to the total tolls and revenue as provided in section 1 of article IV hereof. The railroad company agrees that any such claims that may be brought against it shall be turned over to the telegraph company for defense, settlement or compromise as the telegraph company may elect, or that such claims, if defended, settled or compromised by the railroad company, shall be defended, settled or compromised subject to the approval of the telegraph company.

X. The telegraph company agrees not to use the premises of the railroad company for any purpose other than those specified in this agreement.

XI. The general terms and conditions of this agreement shall apply to all lines of railroad now or hereafter acquired or controlled by the railroad company as a part of its system east of Pittsburg and Erie, except so far as it may be inconsistent with existing contracts binding upon lines of railroad now controlled by the railroad company, and with contracts binding upon lines of railroad hereafter acquired by the railroad company and made before such acquisition. But should the railroad company hereafter acquire additional lines of railroad having contracts with the telegraph company, such lines of railroad shall, at the request of the railroad company, be brought under the general terms and provisions of this agreement.

XII. The railroad company shall have the right to the free use in connection with its general railroad telegraph business of any

patent rights, or new discoveries, or inventions that the telegraph company now owns, uses, or controls in its general telegraph businesss, or which it may hereafter own, use, or control as aforesaid.

XIII. It is understood and agreed that all commercial telegraph business transacted in the stations and offices, and delivered from the trains of the railroad company for the public shall come
89 within the terms of this agreement and subject to the provisions thereof.

The division of tolls under existing agreements between the telegraph company and connecting companies is shown on Schedule C hereto annexed. It is understood and agreed that the division of tolls specified in any future agreements between the telegraph company and other parties shall be subject to the approval of the railroad company in so far as said division of tolls reduces the percentage to the railroad company under this contract of total tolls on any commercial telegraph business transacted by the telegraph company under said future agreements.

XIV. In the event of interruption at any point to all of the wires of the railroad company it is understood and agreed that the railroad company shall have the free use of one of the telegraph company's working wires until at least one of the railroad company's wires has been restored to working order.

XV. Should the railroad company hereafter determine that the safe, efficient and economical management of the telegraph wires upon its lines requires that the same should be placed in conduits and the poles be removed from its right of way, and the same can be done without impairing the efficiency of the service performed by the telegraph company for the public, it shall have the right to so arrange for placing the wires of the telegraph company either in separate conduits or in conduits jointly with the wires of the railroad company, but should such determination not be satisfactory to the telegraph company, or should the parties hereto be unable to agree upon an equitable basis of compensation to be paid by the telegraph company for such facilities, or upon any modifications in this contract which may be necessitated thereby, any differences existing between said parties in reference thereto shall be determined by the arbitration of three competent and disinterested parties, one to be appointed by each, and the two so appointed to elect a third, and the decision of a majority thereof to be final.

XVI. This agreement shall be in full force and effect for the term of fifteen (15) years from the first day of July, 1902, and shall then absolutely terminate without notice unless at least one year before such first day of July, 1917, provision shall have been made for its extension by the written agreement of the parties hereto.

It is understood and agreed that the telegraph company shall have the right at any time during the life of this agreement to remove any part or all of its said wires erected upon the rights
90 of way of the railroad company under the terms of this agreement. If however the wire thus removed is a portion of the original 12,000 miles, the railroad company shall not be required

to make provision for its attachment elsewhere. At the expiration of this agreement the telegraph company shall remove within three months thereafter all of its wires and fixtures then erected upon the railroad company's rights of way, and if not so removed the railroad company may remove them at the expense of the telegraph company; or the railroad company shall have the right to purchase from the telegraph company all or any portion of said wires and fixtures at their then value, to be determined by arbitration as provided in article XV if the parties hereto cannot agree upon the same.

In witness whereof the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

POSTAL TELEGRAPH-CABLE COMPANY,
By WM. H. BAKER, *Vice-President.*

[Corporate Seal.]

Attest: CHAS. P. BRUCH, *Ass't Secretary.*

THE PENNSYLVANIA RAILROAD COMPANY,
By A. J. CASSATT, *President.*

[Corporate Seal.]

Attest: LEWIS NEILSON, *Secretary.*

91 SCHEDULE A.

United Railroads of New Jersey Division.

From—	To—	Miles.	
Main line and branches:			
Phila. (35th St. Jc.), Pa.	Jersey City, N. J.	87.14	
Phila. (Frankford), Pa.	Phila. (Kensington), Pa.	2.84	
Trenton, N. J.	Bordentown, N. J.	6.10	
Princeton Jc., N. J.	Princeton, N. J.	3.11	
Monmouth Jc., N. J.	Jamesburg, N. J.	5.59	
Metuchen, N. J.	Bonhampton, N. J.	1.89	
Newark (Market St.), N. J.	Harrison, N. J.	1.47	
Jersey City (Bergen Hill), N. J.	Jersey City (Harsimus Cove), N. J.	1.55	
			109.69
Camden & Amboy R. R. and branch:			
Camden, N. J.	South Amboy, N. J.	61.22	
Florence, N. J.	Wood's iron works, N. J.	2.17	
			63.39
Perth Amboy and Woodbridge R. R.:			
Rahway (P. A. & W. Jc.), N. J.	Perth Amboy, N. J.		6.40
Millstone and New Brunswick R. R.:			
Millstone Jc., N. J.	East Millstone, N. J.		6.64

From—	To—	Miles.	
Rocky Hill R. R. and Kingston Branch United railroads:			
Monmouth Jc., N. J.	Rocky Hill, N. J.		6.54
Belvidere Delaware R. R. and branches:			
Trenton, N. J.	Manunka Chunk, N. J.	67.49	
Trenton (Coalport), N. J.	Trenton (Millham Jc.), N. J.	1.11	
Trenton (Coalport), N. J.	East Trenton, N. J.	1.67	
Lambertville, N. J.	Flemington, N. J.	11.55	
Martin's Creek, N. J.	Jc. with Bangor & Port. R. R.	0.29	
			82.11
Connecting railway lines:			
Phila. (Engleside), Pa.	Phila. (Thompson St.), Pa.	0.17	
Phila. (Germantown Jc.), Pa.	Phila. (Chestnut Hill), Pa.	6.75	
Phila. (Midvale Jc.), Pa.	Phila. (Midvale steel works), Pa.	0.85	
Phila. (3-10 m. east of Allen lane)	Fort Washington, Pa.	6.27	
Phila. (6-10 m. east of N. Penn Jc.)	Phila. (Cambria & "B" Sts.)	0.78	
Phila. (6-10 m. east of N. Penn Jc.)	Phila. (Oxford road), Pa.	3.55	
Phila. (Tioga St. Sta.), Pa.	Phila. (Jc. P. & T. R. R. east of Tacony), Pa.	5.13	
Phila. (Erie and Trenton Aves.), Pa.	Phila. (Frankford St.), Pa.	1.78	
Phila. (Holmesburg Jc.), Pa.	Phila. (Bustleton), Pa.	4.16	
			29.44
Delaware River R. R. and bridge and branches:			
Phila. (Frankford Jc.)	Pensauken Jc., N. J.	4.82	
East side Dela. Riv. near Delair, N. J.	Fish house, N. J.	0.69	
East side Dela. Riv. near Delair, N. J.	Morris Jc., N. J.	0.90	
Merchantville Jc., N. J.	Haddonfield Jc., N. J.	3.86	
			10.27
New York Bay R. R. and branches:			
Waverly (8-10 m. east of), N. J.	Crossing of Newark & Elizabeth Br. of C. R. R. of N. J.	2.20	
Waverly (8-10 m. east of), N. J.	Meadows yard, N. J.	4.36	
Newark (1-10 m. east of Man'f'rs R. R.), N. J.	Newark (Lister's Agl. Chem. Wks.), N. J.	0.67	
Newark (Passaic river), N. J.	Newark (terminus), N. J.	0.16	
Newark (½ m. west of Emmet St.), N. J.	Newark (18th avenue), N. J.	2.05	
			9.44
92 Freehold & Jamesburg Agricultural R. R.:			
Jamesburg, N. J.	Sea Girt, N. J.		27.54
Columbus, Kinkora & Springfield R. R.:			
Kinkora, N. J.	New Lisbon, N. J.		10.84
Camden & Burlington County R. R. and branch:			
Camden (Pavonia), N. J.	Pemberton, N. J.	22.46	
Burlington, N. J.	Mt. Holly, N. J.	7.15	
			29.61

From—	To—	Miles.	
Mt. Holly, Lumberton & Medford R. R.:			
Mt. Holly, N. J.	Medford, N. J.		5.95
Vincentown Branch R. R.:			
Evansville, N. J.	Vincenton, N. J.		2.84
Philadelphia & Long Branch R. R. and branches:			
Birmingham, N. J.	Bay Head Jc., N. J.	46.09	
New Lisbon (1 7-10 m. east of), N. J.	Brown's Mills - in - the-Pines, N. J.	1.80	
Island Heights Jc., N. J.	Island Heights, N. J.	1.18	
			49.07
Philadelphia & Beach Haven R. R.:			
Manahawkin, N. J.	Beach Haven, N. J.		12.09
Barnegat R. R.:			
Barnegat City Jc., N. J.	Barnegat, N. J.		7.73
Pennsylvania Railroad Division.			
Main line and branches:			
Phila. (Broad St. Sta.), Pa.	Pittsburg, Pa.	352.15	
West Phila., Pa.	Dock St., Phila., Pa.	7.84	
Pollock and Swanson Sts., Phila., Pa.	Swanson and Morris Sts., Phila., Pa.	1.22	
Hamburg Jc., Phila., Pa.	Girard Pt. and Pt. Breeze, Phila.	2.06	
Haverford St., West Phila., Pa.	South St., West Phila., Pa.	1.70	
Girard Point, Phila., Pa.	Eleventh St., Phila., Pa.	1.49	
Frazer, Pa.	West Chester, Pa.	6.82	
Glen Loch, Pa.	Morrisville, Pa.	45.64	
Conestoga Jc., Pa.	Dillerville Jc., Pa.	2.42	
Dillerville Jc., Pa.	Branch Int., via Columbia, Pa.	29.50	
Columbia, Pa.	South Columbia, Pa.	0.53	
Tyrone, Pa.	Vail, Pa.	3.15	
Lilly, Pa.	Coal mines, Pa.	2.12	
Ben's Creek, Pa.	Coal mines, Pa.	1.61	
Sonman, Pa.	Terminus, Pa.	0.77	
Portage, Pa.	Coal Tipple, Pa.	3.63	
Ben's Creek, Pa.	Summerhill, Pa.	0.60	
Summerhill, Pa.	South Fork, Pa.	2.03	
Conemaugh, Pa.	Johnstown, Pa.	1.60	
Donohoe, Pa.	Crabtree, Pa.	8.12	
Jeannette, Pa. (Brush Cr. Br.)	Terminus, Pa.	0.54	
Jeannette, Pa. (Bull Run Br.)	Terminus, Pa.	0.71	
Manor, Pa.	Claridge, Pa.	4.30	
Irwin, Pa.	Gratztown, Pa.	10.19	
Stewart, Pa.	Export, Pa.	10.86	
Saunders, Pa.	Terminus, Pa.	3.87	
Stewart, Pa.	Carnegie's Union R. R., Pa.	5.90	
Fifty-second St., W. Phila., Pa.	Pottsville, Pa.	91.58	
West Manayunk, Pa.	Pencoyd, Phila., Pa.	1.28	
Phœnixville, Pa.	Frazer, Pa.	10.65	
Court St., Reading, Pa.	Sixth St., Reading, Pa.	0.98	
Pottsville, Pa.	Primrose, Pa.	7.49	
			623.35

From—	To—	Miles.	
93 Downington & Lancaster R. R.:			
Downington, Pa.	Conestoga Jc., Pa.		37.58
Pomeroy & Newark R. R.:			
Pomeroy, Pa.	Newark (Jc. with P. W. & B. R. R.), Del.		26.70
Lancaster & Reading Narrow Gauge R. R.:			
Lancaster, Pa.	Quarryville, Pa.		15.21
Bedford & Bridgeport Ry.:			
Mt. Dallas, Pa.	Pa. and Md. State line	38.70	
Bedford, Pa.	Holderbaum, Pa.	10.47	
			49.17
Lewisburg & Tyrone R. R. (P. R. R. portion):			
Tyrone, Pa.	Fairbrook, Pa.	19.90	
Fairbrook, Pa.	Scotia, Pa.	5.30	
Juniata Jc., Pa.	Juniata, Pa.	2.08	
			27.28
Bald Eagle Valley R. R. (P. R. R. portion):			
Vail, Pa.	Lock Haven, Pa.	51.20	
Snow Shoe intersection, Pa.	Per Se, Pa.	22.22	
Sugar Camp Jc., Pa.	Lehigh Val. Coal Co.'s mine, Pa.	4.72	
Grauer Branch Jc., Pa.	Terminus, Pa.	2.05	
Milesburg, Pa.	Bellefonte, Pa.	2.99	
			83.18
Tyrone & Clearfield Ry.:			
Vail, Pa.	Grampian, Pa.	49.63	
Osceola Jc. (Osceola Br.), Pa.	Terminus, Pa.	0.78	
Osceola Jc. (Moshannon Br.), Pa.	Terminus, Pa.	11.98	
Big Run Jc., Pa.	Terminus, Pa.	2.43	
Moshannon and Clearfield Jc., Pa.	Terminus, Pa.	8.81	
Beaver Jc., Pa.	Coal mines, Pa.	0.83	
Leskie Jc., Pa.	Leskie colliery, Pa.	1.32	
Barnes Jc., Pa.	Terminus, Pa.	0.74	
Ednie Jc., Pa.	Terminus, Pa.	0.34	
Forsyth Jc., Pa.	Terminus, Pa.	0.39	
Coal Run Jc., Pa.	Coal mines, Pa.	3.96	
Morgan Run Jc., Pa.	Coal mines, Pa.	4.05	
Goss Run Jc., Pa.	Coal mines, Pa.	1.91	
Goss Run Jc., No. 2, Pa.	Coal mines, Pa.	1.56	
Goss Run Jc., No. 3, Pa.	Coal mines, Pa.	1.26	
Houtzdale Jc., Pa.	Coal mines, Pa.	0.74	
Amesville Jc., Pa.	Coal mines, Pa.	2.39	
Amesville Branch Ext. Jc., Pa.	Coal mines, Pa.	2.08	
Amesville Branch No. 3 Jc., Pa.	Coal mines, Pa.	2.39	
Kendrick Jc., Pa.	Terminus, Pa.	0.70	
Madera Jc., Pa.	Coal mines, Pa.	8.44	
Little Muddy Run Jc., Pa.	Terminus, Pa.	3.08	
Muddy Run Jc., Pa.	Terminus, Pa.	3.35	
Smoke Run Jc., Pa.	Terminus, Pa.	0.99	
Banian Jc., Pa.	Coal mines, Pa.	2.66	
Pine Run Jc., Pa.	Coal mines, Pa.	4.90	
Beulah Jc., Pa.	Coal mines, Pa.	0.54	
Mapleton Jc., Pa.	Coal mines, Pa.	3.20	

From—	To—	Miles.	
Mapleton Jc., No. 2, Pa.	Coal mines, Pa.	2.24	
Mapleton Jc., No. 3, Pa.	Columbia colliery, Pa.	0.92	
Philipsburg, Pa	Morrisdale, Pa.	3.49	
Derby Jc., Pa	Coal mines, Pa.	1.19	
Graham Jc., Pa	Coal mines, Pa.	1.58	
Liveright Jc., Pa.	Terminus, Pa.	0.97	
Grampian, Pa	Terminus, Pa.	1.62	
Betz Jc., Pa.	Terminus, Pa.	1.70	
			139.16
Tipton R. R.:			
Tipton, Pa.	Tipton Run coal mines, Pa.		4.44
94 Pennsylvania & North Western R. R.:			
6-10 m. west of Bellwood, Pa.	Horatio, Pa.	61.44	
Tigart, Pa	Max Frick's mines, Pa.	2.16	
Glasgow, Pa.	Beccaria mine, Pa.	0.93	
Irvona, Pa.	Bratton's Mills, Pa.	3.86	
Punxsutawney, Pa.	Berwind White mine, Pa.	5.57	
Anita, Pa.	Schaller mine, Pa.	1.40	
Horatio, Pa.	Fordham, Pa.	3.28	
			78.64
Hollidaysburg, Morrison's Cove, etc., branches:			
Altoona, Pa.	Hollidaysburg, Pa.	7.30	
Duncansville, Pa.	Portage iron works, Pa.	0.60	
Hollidaysburg, Pa.	Henrietta, Pa	18.90	
Roaring Spring, Pa.	Ore Hill, Pa.	3.00	
Martinsburg Jc., Pa.	Martinsburg, Pa.	0.70	
Morrison's Cove Jc., Pa.	Petersburg Jc., Pa.	31.61	
Canoe Creek Jc., Pa.	Moore's Mill, Pa.	2.62	
Crissman Jc., Pa.	Terminus, Pa.	1.24	
Clapper Jc., Pa.	Terminus, Pa	0.76	
Springfield Jc., Pa.	Oreminea, Pa.	8.20	
Clover Creek Jc., Pa.	Clover Creek quarries, Pa.	2.38	
"Y" switches, Pa.	Newry, Pa.	3.00	
			80.31
Cambria & Clearfield Ry.:			
Cresson, Pa.	Hoover's Mill Jc., Pa.	49.59	
Kaylor, Pa.	Ebensburg, Pa.	4.81	
Bradley Jc., Pa.	Cherry Tree, Pa.	17.61	
Carrolltown Road, Pa.	Coal mines, Pa.	0.63	
Spangler (Sterling Jc.), Pa.	Coal mines, Pa.	1.86	
Spangler (Lantzy Jc.), Pa.	Coal mines, Pa.	0.55	
Barnesboro (Walnut Run Jc.), Pa.	Coal mines, Pa	2.25	
Barnesboro (Porter Run Jc.), Pa	Coal mines, Pa.	1.68	
Barnesboro (Gardner Run Jc.), Pa.	Coal mines, Pa.	1.23	
Patton (Patton Jc., No. 1), Pa	Coal mines, Pa.	1.24	
Patton (Patton Jc., No. 2), Pa.	Coal mines, Pa.	2.16	
Patton Jc., No. 3, Pa.	Coal mines, Pa.	3.00	
Patton (Patton Jc., No. 4), Pa.	Coal mines, Pa.	0.46	
Garway, Pa.	Mitchell's mines, Pa.	5.81	
Welshdale, Pa.	Coal mines, Pa.	1.52	
St. Lu Jc., Pa.	Coal mines, Pa.	0.43	
La Jose Jc., Pa.	La Jose, Pa.	0.55	
Cush Creek Jc., Pa.	Terminus, Pa.	1.55	
Glen Campbell Jc. (McCoy's Run branch)	Coal mines, Pa.	2.19	
Glen Campbell Jc. (Whitehead branch)	Coal mines, Pa	0.59	
Glen Campbell Jc. (Brady's Run branch)	Coal mines, Pa.	0.78	

From—	To—	Miles.	
Glen Campbell Jc. (Glen Campbell branch)	Coal mines, Pa	1.46	
Glen Campbell Jc. (Hoover's Mill branch)	Hoover's Mill, Pa	0.34	
Glen Campbell Jc. (Suter branch)	Coal mines, Pa	0.37	
			102.66
Ebensburg & Black Lick R. R.:			
Ebensburg, Pa	Dilltown, Pa	18.93	
Twin Rocks, Pa	Terminus, Pa	1.10	
¾ m. east of Vintondale, Pa	Black Lick coal mines, Pa.	0.85	
			20.88
Cresson & Irvona R. R.:			
Cresson, Pa	Irvona, Pa	26.67	
Condron, Pa	Coal mines, Pa	1.52	
Flinton, Pa	Kreamer's saw mill, Pa	0.85	
Coalport, Pa	Coal mines, Pa	0.50	
			29.54
South Fork R. R.:			
South Fork, Pa	Ashtola, Pa	20.71	
Lovett Station, Pa	Lloydell, Pa	4.05	
2-10 m. north of Lovett, Pa	Llanfair, Pa	5.26	
Eureka No. 30 Jc., Pa	Eureka No. 37 Mine, Pa	1.45	
Eureka No. 30 Jc., Pa	Eureka No. 39 Mine, Pa	6.80	
95 **South Fork R. R.—Continued:**			
Paint Creek Jc., Pa	Eureka Mine, No. 30, Pa.	1.64	
28-100 m. north of Windber, Pa	Eureka Mine, No. 31, Pa.	0.74	
7-100 m. south of Windber, Pa	Eureka Mine, No. 35, Pa.	0.76	
60-100 m. south of Windber, Pa	Eureka Mine, No. 36, Pa.	1.00	
22-100 m. south of Windber, Pa	Eureka Mine, No. 32, Pa.	0.78	
1 59-100 m. south of Windber, Pa	Eureka Mine, No. 34, Pa.	0.35	
4 60-100 m. south of Windber, Pa	Curry Mill, Pa	1.40	
			44.94
Indiana branch:			
Blairsville intersection, Pa	Indiana, Pa	18.91	
Tearing Run Jc., Pa	Terminus, Pa	0.83	
Homer and Cherrytree Jc., Pa	Terminus, Pa	0.45	
			20.19
Western Pennsylvania R. R.:			
Bolivar, Pa	Allegheny City, Pa	77.22	
Butler Jc., Pa	Butler, Pa	21.05	
Bolivar Jc., Pa	Dornock Point, Pa	16.53	
Blairsville, Pa	Terminus, Pa	1.50	
Jc. 1¼ m. west of Saltsburg, Pa	Terminus, Pa	0.77	
5 7-10 m. west of Saltsburg, Pa	Terminus, Pa	2.11	
Apollo Jc., Pa	Beale's quarry, Pa	1.98	
Anderson Jc., Pa	Hill Junction, Pa	2.57	
Schenley Jc., Pa	Allegheny Valley R. R., Pa.	5.05	
Bailey's Run Jc., Pa	Terminus, Pa	0.30	
			129.08
South West Pennsylvania Ry.:			
Greensburg, Pa	Fairchance, Pa	44.79	
Latrobe, 45-100 m. west of Pa	Whitney Branch Jc., Pa.	3.88	
Lippincott Branch Jc., Pa	Terminus, Pa	1.49	
Whitney Branch Jc., Pa	Terminus, Pa	1.75	
Huff's Station, Pa	Radebaugh, Pa	3.95	
Hempfield Branch Jc., Pa	Terminus, Pa	11.64	
Andrews Run Jc., Pa	Terminus, Pa	1.72	
Youngwood, Pa	Trauger, Pa	7.87	

From—	To—	Miles.	
Boyer Run Jc., Pa.	Terminus, Pa.	1.82	
Brinker Run Jc., Pa.	Terminus, Pa.	2.10	
Shoup, Pa.	Mammoth, Pa.	2.37	
Bessemer Jc., Pa.	Bessemer coke ovens, Pa.	1.65	
Hunker (Hunker Branch Jc.), Pa.	Terminus, Pa.	1.21	
Hunker (Westmoreland Br. Jc.), Pa.	Terminus, Pa.	0.43	
Ruffsdale Jc., Pa.	Terminus, Pa.	1.24	
Tarr Station, Pa.	Terminus, Pa.	0.65	
Alverton (Stoneville Br. Jc.), Pa.	Terminus, Pa.	1.51	
Scottdale-Overton (Scottdale Br. Jc.).	Junebug branch, Pa.	1.87	
Junebug Jc. with Scottdale Br., Pa.	Jc. with Morewood branch, Pa.	1.20	
Schoonmaker Jc. with Junebug Br., Pa.	Terminus, Pa.	0.46	
Junebug Branch, Pa.	Morewood, Pa.	1.73	
Texas Jc. with Junebug Br., Pa.	Terminus, Pa.	4.98	
Everson Pa.	Youghiogheny (No. R. R.) Pa.	1.92	
New Haven, Pa.	Monarch, Pa.	5.87	
Watt (5-10 m. north of), Pa.	Terminus, Pa.	1.18	
Watt, Pa.	Terminus, Pa.	1.12	
Dunbar (6-10 m. south of), Pa.	Terminus, Pa.	0.38	
Uniontown (3-10 m. north of), Pa.	Ache Jc., Pa.	8.07	
Rainey Jc., Pa.	Terminus, Pa.	2.44	
Shamrock Jc.	Terminus, Pa.	1.32	
Oliphant (6-10 m. south of), Pa.	Terminus, Pa.	1.71	
Wynn Jc., Pa.	Terminus, Pa.	0.26	
			124.58
Pittsburgh, Virginia & Charleston Ry.:			
Pittsburgh (South Side), Pa.	West Brownsville, Pa.	53.20	
23d St., Pittsburgh (S. side), Pa.	Fifth St., Pittsburg (S. side).	1.73	
Hays Station, Pa.	Harrison coal works, Pa.	0.78	
Cochran (2-10 m. south of), Pa.	McKeesport, Pa.	1.52	
Peters Creek, Pa.	Terminus, Pa.	5.33	
West Brownsville Jc., Pa.	Redstone Jc., Pa.	16.56	
Brownsville Branch Jc., Pa.	Brownsville, Pa.	1.00	
Keister Jc., Pa.	Terminus, Pa.	1.34	
96 Pittsburgh, Virginia and Charleston Ry.—Continued:			
Vance's Mill Jc., Pa.	Bute, Pa.	2.91	
Bute Run Jc., Pa.	Taylor & Fulton Coke Wks., Pa.	1.33	
Gates, Pa.	Riverview, Pa.	5.60	
Huron, Pa.	Edenborn, Pa.	3.49	
Gates, Pa.	Lambert, Pa.	3.03	
Cat's Run Jc., Pa.	Griffen, Pa.	1.20	
			99.02
Port Perry branch:			
East Pittsburgh, Pa.	Thomson, Pa.	1.32	1.32
Monongahela & Washington R. R.:			
Monongahela City, Pa.	Terminus, Pa.		14.29
Masontown & New Salem R. R.:			
Moser Run Jc., Pa.	Buffington, Pa.		6.04

Philadelphia & Erie Railroad Division.

From—	To—		Miles.
Main line and branches:			
Sunbury, Pa.	Erie, Pa.	287.56	
Queen's Run (1–10 m. east of), Pa.	Terminus, Pa.	3.60	
Williamsport (Allen's), Pa.	Nisbet, Pa.	7.39	
Newburry (7–10 m. east of), Pa.	Williamsport (Market St.)	1.93	
Williamsport (Third St. Jc.), Pa.	Loyalsock creek, Pa.	2.63	
Williamsport (Hepburn St.)	Williamsport (3d St. cross.)	1.22	
Williamsport (Park St.)	Williamsport (Rose St.)	0.47	
		4.32	
			304.80
Johnsonburg railroad and branch:			
Johnsonburg, Pa.	Clermont, Pa.		19.69
Ridgway & Clearfield R. R.:			
Ridgway, Pa.	Falls creek, Pa.		27.23
Bald Eagle Valley R. R. (B. N. & L. branch, P. & E. portion):			
Lemont (Jc. L. & T. R. R.), Pa.	Bellefonte, Pa.		9.45
Lewisburg & Tyrone R. R. (P. & E. portion):			
Montandon, Pa.	Lemont (Jc. with B. E. V. R. R.), Pa.		57.84
Pennsylvania railroad:			
Sunbury, Pa.	Tomhicken, Pa.	43.44	
Catawissa, Pa.	Wilkesbarre, Pa.	43.13	
Nanticoke, Pa.	Glen Lyon, Pa.	4.69	
Nanticoke, Pa.	West Nanticoke, Pa.	0.61	
Rock Glen Jc. (S. H. & W. Ry.), Pa.	Nescopeck, Pa.	11.96	
Pottsville, Pa.	New Boston Jc. (L. V. R. R.), Pa.	9.86	
Morea, Pa.	Morea Breaker, Pa.	1.00	
Frackville, Pa.	Shenandoah, Pa.	4.98	
Shenandoah (8–10 m. east of), Pa.	William Penn colliery, Pa.	2.54	
Selinsgrove Jc., Pa.	Lewistown Jc., Pa.	44.74	
Lewistown, Pa.	Milroy, Pa.	11.14	
			178.09

Buffalo & Allegheny Valley Division.

Allegheny Valley Ry. main lines:			
Pittsburg	Oil City	132.50	
Red Bank	Driftwood	109.70	
			242.20
Indian Run branch:			
New Kensington, Pa.	Parnassus, Pa.	1.31	1.31
Plum Creek branch:			
Verona	Plum Creek	6.80	6.80
Sligo branch:			
Lawsonham	Sligo	10.20	10.20

97 *Northern Central Railway Lines.*

From—	To—	Miles.	
Main line and branch:			
Sunbury, Pa.	Dauphin, Pa.	45.31	
Marysville, Pa.	Baltimore, Md.	91.51	
		136.82	
Hollis, Md.	Green Spring Jc., Md.	8.59	
			145.41
Elmira & Lake Ontario R. R. and branches:			
Canandaigua, N. Y.	Chemung Jc. (Erie R. R.), N. Y.	64.00	
Canandaigua, N. Y.	Canandaigua Lake, N. Y.	1.43	
Stanley, N. Y.	Sodus Point, N. Y.	34.18	
			99.61
Elmira & Williamsport, R. R.:			
Southport Jc. (Erie R. R.), N. Y.	Williamsport, Pa.		75.50
Shamokin Valley & Pottsville R. R. and branches:			
Sunbury, Pa.	Mt. Carmel, Pa.	27.30	
Lancaster Jc. (1 4-10 m. east of Shamokin)	Hickory Ridge colliery, Pa.	2.48	
Scott Jc., Pa.	Scott breaker, Pa.	2.84	
Green Ridge Jc., Pa.	Union Coal Co.'s store, Pa.	1.49	
Fagley Jc., Pa.	Terminus, Pa.	1.55	
Richards Jc., Pa.	Richards colliery, Pa.	1.54	
Mt. Carmel (Montelius Jc.), Pa.	Mt. Carmel breaker (east of), Pa.	1.22	
			38.42
Lykens Valley R. R.:			
Millersburg, Pa.	Williamstown (4-10 m. west of), Pa.		19.29
Rockville branch, P. R. R.:			
Dauphin, Pa.	Rockville, Pa.		2.82
York branch, P. R. R.:			
Columbia, Pa.	York, Pa.		12.88
York, Hanover & Frederick R. R.:			
York, Pa.	Frederick, Md.		55.65
Union R. R.:			
Baltimore (Cen. of North St.), Md.	Bay View Jc. (P. W. & B. R. R.), Canton & Colgate creek, Md.		9.65

Philadelphia, Wilmington & Baltimore Railroad and Operated Lines.

From—	To—	Miles.
Main line and branches:		
Phila. (Broad and Prime Sts.), Pa.	Baltimore (President St.), Md.	94.47
Phila. (Jc. with Junc. R. R.), Pa.	Phila. (Gray's Ferry station), Pa.	0.20
Perryville (P. W. & B. Jc.), Md.	Perryville (C. & P. D. Ry. Jc.), Md.	0.32
Bayview (P. W. & B. Jc.), Md.	Bayview (Union R. R. Jc.), Md.	0.06

From—	To—	Miles.	
Phila. (Broad and Wash. Ave.), Pa....	Phila. (Del. Riv. & Wash. Ave.)	1.37	
Phila. (Wash. Ave. and Swanson St.), Pa.	Phila. (Swanson and Almond Sts.)	0.34	
Penna. and Delaware State line.....	Naaman's creek, Del.....	0.72	
Edgemoor, Del.....	Newport (north of), Del.	4.82	
Landlith (Wilmington), Del.....	Wilmington (Augustine's mill).	2.14	
Wilmington (West Yard Jc.), Del.....	Shellpot Branch crossing and Jc. with Delaware R. R., Del.	0.97	
Newark, Del.....	Delaware City, Del.. ...	11.79	
			117.20
Junction railroad:			
Phila. (Belmont Jc., P. & R. R. R.)...	Phila. (Gray's ferry), Pa.....		3.62
South Chester railroad and branches:			
Chester (Howell St.), Pa.....	Penna. and Delaware State line.	2.72	
Lamokin, Pa	Lamokin (Jc. with So. Ches. R. R.)	0.49	
Linwood, Pa.....	Marcus Hook, Pa.....	0.55	
			3.76
Elkton & Middletown railroad:			
Elkton, Md.....	Big Elk river, Md.		0.33
Columbia & Port Deposit railway:			
South Columbia, Pa.....	Perryville, Md.....		42.68
98 Baltimore & Potomac railroad and branches:			
Baltimore, Md.....	Bowie, Md.....	24.40	
Bowie, Md.....	Pope's Creek, Md.....	48.70	
Bowie, Md.....	So. end Long bridge, opposite Washington, D. C., Va.	18.90	
Loudon Park, Md.....	Clermont stock yards, Md.	1.20	
			93.20
Washington Southern Railway branch:			
So. end Long bridge, opposite Washington, D. C.	Roslyn, Va		3.18
Philadelphia & Baltimore Central railroad and branches:			
Phila. (31st and Chestnut Sts.), Pa	Wawa, Pa	16.77	
Wawa, Pa	Octoraro Jc. (C. & P. D. R. R.), Md.	45.83	
Wawa, Pa.....	West Chester, Pa.....	9.43	
Brandywine Summit, Pa.....	Kaolin works, Pa	1.63	
			73.66
Philadelphia & Delaware County railroad:			
Fernwood, Pa	Newton Square, Pa.....	9.93	
Cardington Jc., Pa.....	Millbourne Mills, Pa.....	1.96	
			11.89

From—	To—	Miles.	
Chester Creek R. R.:			
Lenni, Pa	Lamokin, Pa		6.69
Delaware railroad:			
Shellpot crossing (Jc. with P. W. & B. R. R.), Del.	Delmar, Del. & Md	95.22	
Shellpot Branch Jc., Del	New Castle, Del	5.45	
Townsend, Del	Centreville, Md	35.15	
Clayton, Del	Smyrna, Del	1.29	
Clayton, Del	Oxford, Md	54.30	
Seaford, Del	Cambridge, Md	32.97	
			224.38
Smyrna & Delaware Bay R. R.:			
Clayton, Del	Del. and Md. State line		6.95
Baltimore & Delaware Bay R. R.:			
Del. and Md. State line	Chestertown, Md	22.92	
Worton, Md	Nicholson, Md	3.72	
			26.64
Delaware, Maryland & Virginia railroad:			
Harrington, Del	Rehoboth, Del	43.57	
Georgetown, Del	Franklin City, Va	53.96	
			97.53

West Jersey & Seashore Railroad Lines.

From—	To—	Miles.	
Main lines and branches:			
Camden, N. J	Cape May, N. J	80.92	
Camden, N. J	Atlantic City, N. J	58.73	
Woodbury, N. J	Salem, N. J	28.39	
Salem (branch in), N. J	Salem, N. J	1.27	
Elmer, N. J	Riddleton Jc., N. J	10.38	
Alloway Jc., N. J	Quinton, N. J	4.22	
Glassboro, N. J	Bridgeton, N. J	19.68	
Bridgeton (Main St.), N. J	Bridgeton (Pearl and Lemon Sts.) N. J.	1.67	
Manumuskin, N. J	Maurice river, N. J	9.76	
Newfield, N. J	Atlantic City (Atl. City Div. Jc.) N. J.	32.60	
Pleasantville, N. J	Somers' Point, N. J	7.14	
Sea Isle Jc., N. J	Ocean City, N. J	16.47	
Sea Isle City, N. J	Stone Harbor, N. J	9.14	
Anglesea Jc., N. J	Holly Beach, N. J	7.24	
Absecon inlet, N. J	Atlantic City (Seaview excursion house), N. J.	3.04	
Atlantic City (Seaview excursion house).	Longport, N. J	5.67	
Atlantic City (W. J. & S. Jc. at Drawbridge), N. J.	Atlantic City (Providence Ave. south of Chelsea), N. J.	1.23	
Haddonfield, N. J	Medford, N. J	11.98	
			309.53
99 Delaware River R. R.:			
Woodbury, N. J	Pennsgrove, N. J		19.99

Cumberland Valley Railroad Lines.

From—	To—	Miles.
Main line:		
Harrisburg, Pa.	Potomac river (Powell's Bend)	82.20
Cumberland Valley & Martinsburg R. R.:		
Potomac river	Winchester, Pa.	33.65
Dillsburg & Mechanicsburg R. R.:		
Mechanicsburg (Dillsburg Jc.)	Dillsburg, Pa.	7.70
Mont Alto R. R.:		
Mont Alto Jc., Pa.	Waynesboro, Pa.	18.20
Southern Pennsylvania R. R.:		
Marion (C. V. R. R. Jc.), Pa.	Richmond, Pa.	21.40

Revised Summary.

(Excluding lines which have unexpired contracts.)

	Miles.
United Railroads of New Jersey division	469.59
Pennsylvania Railroad division	1,757.56
Philadelphia & Erie Railroad division	597.10
Buffalo & Allegheny Valley division (Western New York and Pennsylvania excluded)	260.51
Northern Central Railway line	459.23
Philadelphia, Wilmington & Baltimore R. R., and operated lines	711.71
West Jersey & Seashore Railroad lines	329.52
Cumberland Valley Railroad lines	163.15
Total	4,748.37

SCHEDULE B.

Washington D. C.

Bridgeville, Del.
Dover, Del.
Edge Moor, Del.
Harrington, Del.
Laurel, Del.
Seaford, Del.
Smyrna, Del.
Wilmington, Del.

Baltimore, Md.
Canton, Md.
Conowingo, Md.
Cumberland, Md.
Frederick, Md.
Union Stock Yards, Md.

Asbury Park, N. J.
Atlantic City, N. J.
Berlin, N. J.
Bordentown, N. J.
Burlington, N. J.
Camden, N. J.

Birmingham, Pa.
Blairsville, Pa.
Butler, Pa.
Chester, Pa.
Coatesville, Pa.
Connellsville, Pa.
Conshohocken, Pa.
Corry, Pa.
East Liberty Stock Yards, Pa.
Ebensburg, Pa.
Elizabethtown, Pa.
Erie, Pa.
Franklin, Pa.
Gap, Pa.
Germantown, Pa.
Greensburg, Pa.
Hamburg, Pa.
Harrisburg, Pa.
Hollidaysburg, Pa.
Huntingdon, Pa.
Jeanette, Pa.
Johnstown, Pa.
Kane, Pa,
Kensington, Pa.

100

Cape May, N. J.
Cape May Court House, N. J.
Egg Harbor, N. J.
Elizabeth, N. J.
Flemington, N. J.
Jersey City, N. J.
Lambertville, N. J.
Newark, N. J.
New Brunswick, N. J.
Ocean City, N. J.
Old Bridge, N. J.
Palermo, N. J.
Point Pleasant, N. J.
Princeton, N. J.
Red Bank, N. J.
Sea Isle City, N. J.
Trenton, N. J.

Brooklyn, N. Y.
Canandaigua, N. Y.
Elmira, N. Y.
New York city, N. Y.
Penn Yan, N. Y.
Sodus, N. Y.
Watkins, N. Y.

Abattoir Drove Yards, Pa.
Allegheny, Pa.
Altoona, Pa.
Lancaster, Pa.
Latrobe, Pa.
Loyalhanna, Pa.
Mt. Pleasant, Westmoreland Co., Pa.
McKeesport, Pa.
Norristown, Pa.
Oil City, Pa.
Pencoyd, Pa.
Philadelphia, Pa.
Pittsburg, Pa.
Pottstown, Pa.
Pottsville, Pa.
Reading, Pa.
Scottdale, Pa.
South Side, Pa.
Steelton, Pa.
Thurlow, Pa.
Tyrone, Pa.
Union City, Pa.
Uniontown, Pa.
Vintondale, Pa.
Warren, Pa
West Chester, Pa.
West Phila., Pa.
West Phila. Stock Yards, Pa.
Wilkesbarre, Pa.
Wilkinsburg, Pa.
Wilmerding, Pa.

SCHEDULE C.

	Penna. Railroad prop'n.	Postal Telegraph-Cable Co. prop'n.	Connecting lines prop'n.
Canadian Pacific Ry. Co.'s Telegraph, east	25	25	50
Canadian Pacific Ry. Co.'s Telegraph, west	12½	12½	75
Rocky Mountain Telegraph Company	33⅓	33⅓	33⅓
North American Telegraph Company	25	25	50
New York, Philada. & Norfolk Telegraph Company	28⅔	28⅔	42½
El Paso & North Eastern Ry. Co	32½	32½	35
Ann Arbor Railroad Co	30	30	40
Postal Telegraph-Cable Co. of Texas	30	30	40
Sante Fe & Grand Canyon Ry. Co	37½	37½	25
Sante Fe, Prescott & Phœnix Ry. Co	16⅔	nil	83⅓

101 In the United States Circuit Court for the District of New Jersey.

Between—

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
and
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants.
} On Bill, etc.

Affidavit of William Ettinger.

(Filed December 18, 1902.)

STATE OF NEW JERSEY, *County of Hudson*, } *ss.:*

William Ettinger, being by me duly sworn, on his oath deposes and says:

That he is division operator of the New York division of the Pennsylvania Railroad Company. That his office is in Jersey City, and that the division extends from the water front in Jersey City, New Jersey, to the city of Philadelphia, in the State of Pennsylvania, and includes the main line of the Pennsylvania railroad from Jersey City to the Delaware river at Trenton. As division operator he has charge of all the telegraph and telephone lines on all the property of The United New Jersey Railroad and Canal Company and The Pennsylvania Railroad Company, the defendants in the above entitled suit, in the State of New Jersey. He has filled such position continuously for twenty-nine years last past.

The following is a general description of the present location of the poles of the Western Union Telegraph Company between Jersey City and the Delaware river, at Trenton, along the main line of the defendants:

Commencing at the Hudson river, the first wires of the line of the Western Union Telegraph Company which are on the property of the United New Jersey Railroad and Canal Company, leased to the Pennsylvania Railroad Company, and which wires form part of the telegraph line from New York to Trenton, consist of a cable attached to the east end of the pier of the defendants, known as pier C,
102 in Jersey City. The said cable runs on or through the property of the defendants westwardly along said pier to the line of solid filling, and thence underground, stil- on the property of defendants, to a point in Exchange place, Jersey City, opposite number 26 Exchange place, and on the north side thereof, a distance of about nine hundred feet from the river end of said pier C. That no portion of said cable is on the right of way of the United New Jersey Railroad and Canal Company or the Pennsylvania Railroad Company.

From said pole said telegraph line runs westwardly on poles erected on property of the defendants, but not on their right of way, to Washington street, a distance of about twelve hundred feet.

From Washington to Warren street, poles and wires of this line are on defendants' property, outside of the right of way.

From Warren street to a point about six hundred feet west thereof, five poles of this line are on the property of the defendant, but outside of their right of way.

From that point to Brunswick street, the wires and poles of this line are outside of the railroad property.

From Brunswick street to a point about sixteen hundred feet west thereof, there are twelve telegraph poles and wires of this line within the right of way of the railroad company.

From a point sixteen hundred feet west of Brunswick street to a point twenty-eight hundred feet west thereof, the telegraph poles and wires are on the defendants' property, but outside of their right of way.

From a point twenty-eight hundred feet west of Brunswick street to a point thirty-seven hundred feet west thereof, the telegraph poles and wires are within the right of way of the railroad company.

From a point thirty-seven hundred feet west of Brunswick street to a point near West Side avenue, Marion, the telegraph poles and wires are on the defendants' property, but outside of their right of way.

From West Side avenue to Giles street, there are eight of the poles of this line outside of the railroad property.

From Giles street to the east side of the Hackensack river, the poles and wires are on defendants' property, but outside of their right of way.

The wires are carried across the Hackensack river on bridge structure of the defendants.

From the westerly bank of the Hackensack river to Sixth street, Harrison, the poles and wires are on defendants' property, outside of their right of way.

103 From Sixth street to Fifth street, Harrison, the poles and wires are on the right of way of the railroad company.

From Fifth street to Fourth street, Harrison, the poles and wires are outside of the right of way, off of the railroad property.

From Fourth street, Harrison, to the Passaic river, the poles and wires are on defendants' right of way.

On Centre Street branch, from Fourth street to the Passaic river, the poles are on defendants' right of way.

The wires of this line are carried across the Passaic river on both the Commercial Dock route and the Centre Street route, by means of cables.

From the westerly side of Passaic river (with the exception of one pole located at the junction of River street and Railroad avenue) to a point near West Newark Junction, the poles are off the right of way and the railroad property.

The said one pole is on the right of way of defendants.

From a point near West Newark Junction to a point about a mile west of Waverly, the poles are outside of defendants' right of way and on defendants' property.

From a point about a mile west of Waverly to the Central railroad, Elizabeth, the poles are within the right of way.

From the Central Railroad crossing at Elizabeth to a point near Rahway avenue, Elizabeth, the poles are on defendants' property, but outside of their right of way.

From Rahway avenue, Elizabeth, to South Elizabeth Station, the poles are outside of railroad property.

From South Elizabeth Station to Main street, Rahway, the poles are on defendants' property, but not on their right of way.

From Main street, Rahway, to Poplar street, the poles are on the right of way.

From Poplar street, Rahway, to Milton avenue, the poles are on defendants' property, but not on their right of way.

From Milton avenue to a point four hundred feet west of Hazelwood avenue, the poles of this line are within the right of way of the railroad company.

From a point four hundred feet west of Hazelwood avenue to Six roads, a distance of about one half a mile, the poles of this line are outside of the right of way of defendants.

From Six roads to the crossing of the Essex and Middlesex turnpike, a distance of about a mile and a half, the poles of this line are on the property of the defendants, but outside of their right of way.

104 From this point to Iselin Station, a distance of about three-quarters of a mile, the poles of this line are on the right of way of the railroad company.

From Iselin to a point about forty-six hundred feet west thereof, the poles of this line are on the property of the defendants, but not on their right of way.

From a point about forty-six hundred feet west of Iselin, to a point about fifty-nine hundred feet west of Iselin, the poles of this line are within the right of way of the railroad company.

From a point fifty-nine hundred feet west of Iselin to the Raritan river, the poles of this line are on the property of the defendants, but not on their right of way.

From the east side of the Raritan river to the west side thereof, the telegraph wires are carried by means of a cable attached to the bridge of the railroad company.

From the west side of the Raritan river to George street in the city of New Brunswick, the poles of this line are outside of the right of way of the railroad company.

From George street, New Brunswick, to Handy street, New Brunswick, the poles of this line are on the right of way of the railroad company.

From Handy street, New Brunswick, to Millstone Junction, a distance of about one mile, the poles of this line are on the property of the defendants, but not on their right of way.

From Millstone Junction to the Delaware river (with the exception of nine poles near Union street in the city of Trenton), the poles of this line are on the right of way of the railroad company.

This line is the line of telegraph referred to in the bill of complaint, as a line of telegraph owned, maintained and operated by the Western Union Telegraph Company over and along the right of way of the above-named defendants.

WM. ETTINGER.

Subscribed and sworn to this 16th day of December, 1902, at Jersey City, N. J., before me,

WILLIAM A. MARTIN,
[L. S.] *Notary Public of New Jersey.*

105 In the United States Circuit Court for the District of New Jersey.

Between—

THE WESTERN UNION TELEGRAPH COMPANY and THE PENNNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company. } On Bill, etc.

Affidavit af Charles M. Sheaffer.

(Filed December 18, 1902.)

Charles M. Sheaffer, being duly sworn says:

1. I am the superintendent of telegraph of the Pennsylvania Railroad Company.

I have occupied that position, and other positions which have obliged me to familiarize myself with the method of construction and operation of telegraph wires and poles, for upwards of twenty years. I am thoroughly familiar with such methods of construction and operation.

2. The usual method of constructing telegraph wires and poles, is to fasten to the pole, at or near the top, a cross arm or bar, upon which the wires are strung. The usual length of the cross arm or bar is seven feet ten inches. Some of these cross bars, however, are ten feet six inches in length. The cross bar or arm is usually made to extend nearly equally on each side of the pole, each arm projecting about four feet beyond it. In some methods of construction, however, the whole cross arm or bar projects from one side of the pole, entailing more danger of falling of the wires thus strung across the arm or bar.

If a line of poles and wires on the side of a railroad right of way, should be constructed in the ordinary manner, with the ordinary length of cross arm, part on each side of the pole, it would be neces-

sary to plant the pole four feet inside of the right of way, physically occupying the point in which the pole is planted, and overhanging nearly eight feet in width of such right of way with the over-laid wires.

3. There is more or less danger attendant upon the stringing of a lot of telegraph wires over the right of way of a railroad company. In case of storms of sleet or snow there is danger of the wires
106 breaking or becoming slack, thereby endangering the operation of the railroad.

4. Where a line of telegraph poles and wires is located along a railroad right of way at curves, it is necessary to guy or to brace the pole by guys of wire, or like substance, or by poles. The point of fastening of the guy rope or wire, or of planting the base of a bracing pole of the height of those now upon the Pennsylvania railroad, should not be less than four feet from the pole braced, and ought, for absolute safety, to be ten feet therefrom.

This guying or bracing necessarily entails a considerable use of the railroad right of way beyond the pole.

5. The railroad company has a line of wires and poles which it uses exclusively for its railroad purposes in the operation of its road. It is necessary for its railroad purposes that this shall be maintained.

Much additional business of telegraphing requires to be done by it in and about the carrying on of its business, which cannot be done upon the line of wires and poles thus used by it exclusively. It has found it necessary for many years and still finds it necessary, to secure the maintenance and use of a second line of wires and poles.

6. There is no place upon the right of way of the railroad company upon which such second line of wires and poles can be located, other than that occupied by the Western Union Telegraph Company prior to the notice given to it to remove its poles and wires from the right of way of the railroad company.

7. For the safety of the railroad company's operations, the control of all telegraph appliances upon its right of way should be reserved to it. An appropriation of a portion of its right of way for use by a telegraph company exclusively for its purposes would subject the business of transportation along the railroad to great risks because of the lack of necessary control over the same by the railroad company.

8. Familiar with the lines of the railroad company and of its system, I say that its whole right of way is necessary for its railroad purposes and the business necessary and properly incidental thereto; and that no additional line of poles and wires beyond the two to which I have referred, can be erected upon its right of way without interfering with the ordinary travel along said railroad, and with its necessary and proper operation.

9. The Western Union Telegraph Company has removed its telegraphic appliances from the depots and stations along the line
107 of the railroad company, and now does its business in many of the cities and towns in which said depots and stations are

located through connections between its lines along the railroad system right of way and the lines leading into various independent offices in said cities and towns.

10. There is not any great difficulty in obtaining, at a reasonable cost, a right of way between all the cities, towns and places of business located along the line of said railroad and of its system. Almost all, if not all, the cities, towns and places of business are connected by roads, streets and highways upon which its telegraph lines can be constructed.

11. I believe and therefore aver that the Western Union Telegraph Company will be enabled without serious delay or difficulty to transact all its business by means of facilities now within its control, outside of the lines of wires and poles on the right of way of the railroad company.

12. The railroad company at very many place- now occupies the whole of the right of way with its railroad tracks and the necessary intervening spaces. The number of such places thus occupied is constantly increasing. During the past twenty years it has frequently found it necessary to increase the width of its original right of way, in order to transact its business. It will, in my judgment, be frequently necessary in the future, for the transaction of such business, to make additional acquirements of land, in further widening of its right of way.

CHARLES M. SHEAFFER.

Sworn to and subscribed before me, a notary public of the Commonwealth of Pennsylvania, this seventeenth day of December, A. D. 1902.

HIRAM H. POTTS, [L. S.]
Notary Public.

Commission expires February 26th, 1905.

108 United States Circuit Court, District of New Jersey.

Between—

WESTERN UNION TELEGRAPH CO., Complainant,
and
PENNSYLVANIA RAILROAD CO. ET ALS., Defendants. } On Bill, etc.

Opinion.

(Filed January 14, 1903.)

Two suits have been brought in this court, the one at law to condemn lands of the defendant company sufficient for the construction, maintenance and operation of the telegraph lines of the complainant, The Western Union Telegraph Company, under and in accordance with the provisions of a certain act of the Congress of

the United States passed July 24, 1866; and the other in equity to restrain the defendant from interfering with the telegraph lines of complainant now erected upon and along defendant's right of way until the question of the complainant's right to condemn the said lands upon the payment of compensation has been determined by the court.

It appears by the record that the complainant company has maintained its telegraph poles and lines upon the right of way used by the defendant for more than forty years and that on September 20, 1881, an agreement was entered into between the complainant and defendant companies to continue for twenty years from that date, in and by which, for the rent therein reserved, the said defendant company granted to said complainant company a right to place, maintain and use upon the right of way of the Pennsylvania Railroad Company and the roads owned, operated or leased by it, a single line of telegraph poles and to maintain thereon such wires as the telegraph company might from time to time elect.

The said agreement also contained this provision:—"If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its
109 poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company."

In accordance with this provision and after it had been determined that they would not renew the contract, the railroad company, on the 15th day of May, 1902, gave notice to the telegraph company that it must remove its poles and wires from their right of way on or before December 1, then next ensuing, and that if it failed so to do, the railroad company would cause them, under the clause of the contract above referred to, to be removed. The bill recites, and the allegation is substantiated by affidavit, that the wires which are strung over and upon the defendants' right of way are a part of a main trunk line, used by them in the interchange of communication for public and commercial purposes between people dwelling in different States of the Union; that their destruction would seriously interfere with such communication; that the lines have been erected at great cost, and that their worth in their present condition is in the neighborhood of three hundred and fifty thousand dollars; and that if the wires should be removed from the poles on which they are strung, and the poles cut down, their value would be less than fifty thousand dollars. It is alleged that under this condition of affairs the pecuniary loss which would be inflicted upon the complainant by the destruction of its poles and wires and the inconvenience entailed upon the general public would be very great; not only the injury would be one which, should the right which the

complainants claim exist, they ought not to be required to suffer, but one for which there could be no adequate pecuniary recovery.

Upon this statement of facts the complainant asked that the defendant company be restrained from removing its poles and wires from its, the defendant company's right of way, in accordance with the strict terms of the contract, until their right of condemnation could be heard and determined; and the court granted a rule to show cause why such preliminary injunction should not issue according to the prayer of the said bill, which said rule now comes on to be heard.

Upon the case now presented it appears that on July 24, 1866, Congress enacted that:

"Any telegraph company now organized or which may hereafter be organized under the laws of any State, shall have the
110 right to construct, maintain and operate telegraph lines * * * over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law * * * but such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post roads."

That act further provided that, before any telegraph company should exercise any of the powers or privileges conferred by the act, such company should file its written acceptance with the Postmaster-General of the restrictions and obligations required by the act.

This act, the bill alleges, was accepted by the complainant company on the eighth day of June, 1867, and since that time the complainant company has conducted its business in accordance with such restrictions and obligations.

All railroads of the United States are by law declared to be post roads, (Revised Statutes, sec. 3964) and the right of way of the defendant company thereby became subject to the provisions of the act of 1866.

While the question here at issue has not the judicial interpretation by the court of last resort, the statute of July 24, 1866, as applicable to post roads, has several times been before the courts for their construction. It has been held that because of this law one company having exclusive privileges under the State law cannot prohibit the erection of the telegraph lines of another company on the post roads of the United States where such other companies have accepted the provisions of the act of July 24, 1866, when those in control of such roads have given their assent. (Pensacola Telegraph Company *vs.* Western Union Telegraph Company, 96 U. S. 1.)

It has also been decided, in United States *vs.* Union Pacific Railroad Company (160 U. S., 1) "That no railroad company owning a post road of the United States over which interstate commerce is carried on, can, consistently with the act of July 24, 1866, bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a State, which accepts the provisions of the act and desires the use of that roadway for its line in such manner as will not interfere with the ordinary travel thereon."

The right of a telegraph company which has complied with the provisions of the law to enter a State and erect its poles and lines therein, in accordance with the act of 1866, is recognized in the case of The Western Union Telegraph Company *vs.* Massachusetts (125 U. S., 530).

111 If a State cannot, by legislative enactment, prohibit a foreign corporation which has complied with the act of 1866 from erecting its poles and wires over a post road belonging to a railroad company which has given its assent thereto; and if a railroad company cannot, by agreement with one telegraph company, bind itself to exclude another telegraph company from the use of its right of way because it is a post road, how can a railroad company (being a post road) nullify the law by arbitrarily refusing to grant them a right which the law confers? Surely if the railroad company cannot bind itself by agreemont to exclude the telegraph company, it cannot do so arbitrarily.

It would seem that inasmuch as the act of July 24, 1866, gave any telegraph company, operating under State laws and accepting the provisions of the act, the right to erect its poles upon the post roads of the United States, so, too, it prohibited the owners of such post roads from doing anything which might be hostile to the object contemplated by Congress, and render its act ineffectual.

Postal Telegraph Company *vs.* Oregon Short Line (114 Fed Rep., 787) was a suit to condemn a right of way for the plaintiff over the road of the Oregon Short Line. All of the questions raised here were there discussed by the learned judge, and the circuit court held that such right of condemnation existed, under the acts of Congress before referred to, and proceeded to assess the damages incurred thereby. Sufficient time has not elapsed since the rendering of this decision to have it passed upon by the court of last resort, and it is not, therefore, binding upon this court. It is not necessary however, that at this time this court should definitely pass upon that question of right. Enough has been said to show that the contention of the complainant of its right to condemn is not without force.

The only question now before the court, upon the return of this rule, is whether the defendants should be enjoined, pending the determination of the complainant's right to condemn, from interfering with the *status quo*, and doing to the complainant an injury which may be irreparable.

The rule relating to the granting of injunctions in such cases is well settled. The jurisdiction of a court of equity, among other things, is founded upon the right to prevent permanent injury for which pecuniary compensation is inadequate. It is not necessary that the court should determine that the complainant is entitled to a final award in its favor; it is enough that the case presented seems sufficiently meritorious to warrant the court in preserving the *status quo* until the real merits of the controversy have been finally determined.

112 In Allison *vs.* Corson (88 Fed. Rep., 581) it was said: "A preliminary injunction may properly issue whenever the

questions of law or fact, to be ultimately determined are grave and difficult and the injury to the moving party will be immediate and certain and great if denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

It seems to me that the situation in the case at bar is analogous to that in the City of Newton *vs.* Lewis (79 Fed. Rep., 715) and that the remarks of Sanborn, circuit judge, apply here with peculiar force: "But the court knew that it must ultimately consider and determine these matters at the final hearing of the case, and if meanwhile it refused to issue the injunction, the property and business of the electric company would be immediately destroyed and the final decree of the court, if it should be in its favor, would be utterly nugatory."

To grant the injunction asked for in this case would result in irreparable injury to no one, while the refusal so to do, from which there would be no appeal, would result in the destruction of complainant's property for which they could receive no compensation.

It has been urged on the part of the defendants that the complainant should be required to vacate the premises of the defendant companies, in accordance with the terms of its contract. This, however, would but entail a great destruction in value of property without compensatory benefit to any one. If the right of condemnation exists, complainants should not be subjected to that loss while exercising it. The defendants also say that they have entered into a new contract, with another telegraph company, and that there is not sufficient room on their right of way to permit the maintenance and operation of the lines of more than one telegraph company. This question ought, I think, for the reasons above given, to await the final determination of the cause.

In view of the facts presented, and for the reasons above stated, I have decided to make permanent this injunction. In this way the defendants will have an opportunity to appeal to the next term of the circuit court of appeals; while, should the rule *he* discharged, the complainant would have no appeal and the injury to its property, which is threatened, would have been accomplished before the case had been properly considered.

Let the rule heretofore granted be made absolute.

ANDREW KIRKPATRICK, *Judge.*

113 In the United States Circuit Court for the District of New Jersey, as yet of the Term of September, 1902.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants.
} On Bill for Injunction.

Order for Preliminary Injunction.

(Filed January 21, 1903.)

The order to show cause heretofore granted in the above stated cause coming on to be heard before the court in presence of John F. Dillon, Rush Taggart, Henry D. Estabrook and Richard V. Lindabury, of counsel with the complainant, and John G. Johnson and James G. Vredenburgh, of counsel with the defendants, and the complainants' bill of complaint and the affidavit annexed thereto and the affidavits filed by the defendants, having been read, and counsel for the respective parties having been heard, and the court having taken time for consideration,

It is now, on this twenty-first day of January, in the year of our Lord, one thousand nine hundred and three, ordered by the court in virtue of the power and authority vested therein by the Constitution and laws of the United States and according to the rules and practice thereof, that a preliminary injunction do issue according to the prayer of the said bill of complaint, to be directed to the said defendants The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, their and each of their servants, agents and employés, restraining the said defendants hereinabove named, and each of them, their and each of their servants, agents and employés, from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them, or of any part thereof, pending the determination of the said action at law referred to in the said bill of complaint, or until the further order of this court in the premises.

ANDREW KIRKPATRICK, *Judge.*

114 In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, Respondents.

Assignment of Errors.

(Filed January 27, 1903.)

The respondents file the following assignments of errors upon which they and each of them will rely upon their appeal from the interlocutory order made by this honorable court on the twenty-first day of January nineteen hundred and three, granting an injunction *pendente lite* in said cause.

The respondents assign in error upon this appeal the following, namely:

The circuit court erred in making said interlocutory order:

First. In deciding that the said court had jurisdiction.

Second. In deciding that a preliminary injunction should issue in accordance with the prayer of the bill of complaint, to be directed to the said defendant The Pennsylvania Railroad Company, restraining the said The Pennsylvania Railroad Company, its servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendant in the State of New Jersey as described in the bill of complaint, or of any — them, or of any part thereof.

Third. In deciding that a preliminary injunction should issue in accordance with the prayer of the bill of complaint, to be directed to the said defendant The United New Jersey Railroad and Canal Company, restraining the said The United New Jersey Railroad and Canal Company, its servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant in the State of New Jersey as described in the bill of complaint, or of any of them, or of any part thereof.

Fourth. The court erred in ordering a preliminary injunction to issue according to the prayer of the said bill of complaint, to
115 be directed to the said defendants, their and each of their servants, agents and employees, restraining the said defendants and each of them, their and each of their servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them or of any part thereof, pending the determination of said action at

law referred to in the said bill of complaint, or until the further order of said court in the premises.

In order that the foregoing assignment of error may be and appear of record, the respondents present the same to the court and pray that such disposition may be made thereof as is in accordance with the law and the statute of the United States in such case made and provided.

All which is respectfully submitted.

JAMES B. VREDENBURGH,
Solicitor for the Pennsylvania Railroad Company.
J. D. BEDLE,
Solicitor for the United New Jersey Railroad and Canal Company.

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, Respondents.

Bond.

(Filed January 27, 1903.)

Know all men by these presents, that we, The Pennsylvania Railroad Company, a corporation, and The United New Jersey Railroad and Canal Company, a corporation, as principals, and American Surety Company of New York, as surety, are jointly and severally held and firmly bound unto the above-named The Western
116 Union Telegraph Company, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said The Western Union Telegraph Company and its successors, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, severally firmly by these presents.

Sealed with our seals. Dated the twenty-sixth day of January in the year of our Lord one thousand nine hundred and three.

The condition of the above obligation is such that WHEREAS, the Pennsylvania Railroad Company and The United New Jersey Railroad Company and Canal Company have taken an appeal to the circuit court of appeals for the third circuit, to reverse an interlocutory order rendered and entered by the circuit court of the United States in and for the district of New Jersey, which order was made and entered in the above-entitled suit on the twenty-first day of January nineteen hundred and three;

Now, therefore, the condition of the above obligation is such that if the above-named The Pennsylvania Railroad Company and The

United New Jersey Railroad and Canal Company, respondents herein, shall prosecute said appeal to effect and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN, *Vice-President.*
LEWIS NEILSON, *Secretary.* [L. S.]
THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY,
By F. WOLCOTT JACKSON, *President.*

Attest:
LEROY H. ANDERSON, *Secretary.* [L. S.]

AMERICAN SURETY CO. OF NEW YORK,
By R. R. BENEDICT,
Resident Vice-President.

Attest:
M. E. NEVILLE, *Resident Ass't Secretary.* [L. S.]

117 The within bond is hereby approved this 27th day of January, 1903.

ANDREW KIRKPATRICK, *Judge.*

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Respondents.
} Bill in Equity.

Petition of Appeal.

(Filed January 27, 1903.)

To the honorable the judges of the United States circuit court:

The above-named respondents in the above-entitled cause, The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, conceiving themselves aggrieved by the order made and entered by the above-named court in the above-entitled cause, under date of January twenty-first, nineteen hundred and three, wherein and whereby it was and is ordered that a preliminary injunction do issue according to the prayer of the said bill of complaint, to be directed to the said defendants, The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, their and each of their servants, agents and em-

ployees, restraining the said defendants and each of them, their and each of their servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant, upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them, or of any part thereof, pending the determination of the said action at law referred to in the said bill of complaint, or until the further action of the said court in the premises, and by which interlocutory order the complainant was awarded a preliminary injunction against the said respondents,—

hereby petition the said court for an order allowing said re-
118 spondents and each of them to prosecute an appeal from said interlocutory order granting said preliminary injunction, to the honorable United States circuit court of appeals for the third circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said respondents shall give and furnish upon such appeal; and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States circuit court of appeals for the third circuit.

And your petitioners will ever pray, &c.

JAMES B. VREDENBURGH,
Solicitor for the Pennsylvania Railroad Company.

JAMES B. VREDENBURG, *Of Counsel.*

J. D. BEDLE,
Solicitor for the United New Jersey Railroad and Canal Company.

I allow this appeal.

ANDREW KIRKPATRICK, *Judge.*

Jan. 27, 1903.

Citation.

(Filed January 29, 1903.)

By the Hon. Andrew Kirkpatrick, judge of the district court of the United States for the district of New Jersey and *ex-officio* judge of the circuit court of the United States for said district, in the third circuit.

To the Western Union Telegraph Company:

Whereas, the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company have lately appealed to the United States circuit court of appeals in the third circuit, from an interlocutory order and decree lately rendered in the circuit court

of the United States for the district of New Jersey, made in
119 favor of you, the said The Western Union Telegraph Company, and has filed the security required by law;

You are therefore hereby cited to appear before the said United States circuit court of appeals for the third circuit to be held at the city of Philadelphia in the State of Pennsylvania on the eighteenth day of February next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton in the district of New Jersey in the third circuit, the twenty-seventh day of January in the year of our Lord one thousand nine hundred and three.

ANDREW KIRKPATRICK, *Judge.*

Service of a copy of the within citation is hereby acknowledged this 27th day of January, 1903.

RUSH TAGGERT,
Sol'r for Appellee,
Per R. V. LINDABURY.

120 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of New Jersey,* } *ss:*

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true and complete transcript of the record in the suit of The Western Union Telegraph Company against The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand [L. S.] and affixed the seal of said court at Trenton, in said district, this sixteenth day of February, nineteen hundred and three.

S. D. OLIPHANT, *Clerk.*

121 And afterwards to wit: on the 20th day of March, A. D. 1903, this cause being called for argument on the transcript of record from the circuit court of the United States for the district of New Jersey, before Hon. M. W. Acheson, and Hon. George M. Dallas, circuit judges, and Hon. Edward G. Bradford, district judge, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit: on the 19th. day of May, A. D. 1903, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania, Defendant in Error. } No. 31.

March Term, 1903.

THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad and Canal Company, Appellants,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee. } No. 14.

Before Acheson and Dallas, circuit judges, and Bradford, district judge.

DALLAS, *Circuit Judge:*

These two cases are parts of one and the same controversy.
122 They were argued together, and may be disposed of in a single opinion. One of them is before this court upon a writ of error to an order of the circuit court for the western district of Pennsylvania, made January 20, 1903, dismissing a petition by which the Western Union Telegraph Company sought to acquire by condemnation the use of the right of way of the Pennsylvania Railroad Company and its branches, for the telegraph company's lines of telegraph. The other is an appeal from a decree of the circuit court for the district of New Jersey, made upon January 21, 1903, awarding an injunction restraining the Pennsylvania Railroad Company and others from interfering with the telegraph lines of the Western Union Telegraph Company upon the right of way of the railroad company.

The situation of the parties, and their relation to each other, at the time these proceedings were instituted, may be briefly indicated. On June 20, 1864, the Pennsylvania Railroad Company contracted with the Atlantic & Ohio Telegraph Company for the use by the latter of the right of way of the railroad company for a telegraph line; and the line which was accordingly constructed, was thereafter operated by the Western Union Telegraph Company as lessee of the Atlantic & Ohio Telegraph Company. On September 20, 1881, however, the Western Union Telegraph Company itself entered into a contract with the Pennsylvania Railroad Company, and under this last mentioned contract, the lines of that telegraph company, over and along the right of way of the railroad company, have since been maintained and operated. This contract, which by its terms, was to continue in force for twenty years from its date, contained the following provisions:

"Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter upon receiving written notice from the railroad company, remove within six months from the receipt of
123 said notice, all of its poles and wires and leave the property of the railroad company in good condition and free -rom the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: Provided, however, that the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectfully hereby expressly agreeing to waive the same.

* * * * * * *

Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the right and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

On May 15, 1902, the railroad company gave a written notice to the telegraph company, as follows:

"PENNSYLVANIA RAILROAD COMPANY,
PHILADELPHIA, 15*th May*, 1902.

Mr. Robert C. Clowry, pres't Western Union Tel. Co., New York city.

MY DEAR SIR: In pursuance of action taken by the board of directors of this company on 14th, May, 1902, I send the enclosed notice.

Kindly acknowledge receipt, and oblige, very truly yours,
124 (Signed) LEWIS NEILSON, *Secretary.*

To the Western Union Telegraph Company:

You are hereby notified to remove within six (6) months from the first day of June, 1902, all of your poles, wires and property from the right-of-way and property of this company and of other companies named in a certain agreement between this company and you dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached), or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and of the other companies referred to in good condition and free from the encumbrances of your said poles, wires, and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good

condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right-of-way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles, and other property, to the satisfaction of the general manager of this company.

In witness whereof, the said The Pennsylvania Railroad Company has caused its corporate seal to be hereunto affixed, duly attested by the signature of its proper officers, this fourteenth day of May, anno Domini, 1902.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By A. J. CASSATT, *President.*

Attest:

(Signed) [SEAL.] LEWIS NEILSON, *Secretary.*"

125 On June 20, 1902, the telegraph company sent to the railroad company $6250, "payment due June 20, 1902, as per contract," and this sum the railroad company's comptroller accepted. It does not appear, however, that he either intended or was authorized to waive the notice of May 15, 1902, which, it will be observed, had been ordered by the board of directors of the railroad company, and was given under its corporate seal, attested by the signatures of its president and secretary. Moreover, this remittance did not relate to a time extending beyond that within which the notice had required that the removal should be effected, but covered a period during the running of the notice, when the telegraph company was, under the contract, entitled to continue in occupation without payment of rent. In short, a sum of money which was not demanded nor demandable, was voluntarily paid, not in extension of the term, but upon the erroneous assumption that it was due "as per contract;" and although a minor officer or agent of the railroad company inadvertently or mistakenly accepted this payment, the notice which had been previously given, was not, in our opinion, in any way affected thereby. On June 25, 1902, the Pennsylvania Railroad Company entered into a contract with the Postal Telegraph-Cable Company, granting to that company certain pole facilities upon the railroad company's right of way for fifteen years, and the continued presence of the Western Union Company's lines thereon conflicts with the provisions and purposes of that contract.

The decree of the district — of New Jersey was not made upon the merits, but upon the ground that it would result in irreparable injury to no one, and might soon be reviewed upon appeal, whereas an order refusing an injunction would have entailed much loss to the telegraph company, and could not have been appealed from.

126 But now, as to both cases, the substantial rights of the parties are for determination, and to their consideration we accordingly proceed.

The controlling question may be plainly stated. It is this: Has

the telegraph company a contractual right to maintain its telegraph lines upon and over the right of way of the railroad company, or can it, independently of contract, acquire such right by condemnation? The first part of this inquiry admits of but one answer. The contract of September 20, 1881, expressly canceled all contracts theretofore made, and declared that any easement or right of way theretofore acquired by the telegraph company was relinquished and abandoned, and that the rights and easements of the telegraph company upon the right of way of the railroad company, should be such only as were granted by that agreement, and should cease with its termination. Hence, as the agreement had terminated when, in precise accordance with its terms, the notice to remove within six months from the first day of June, 1902, was given, it is manifest that no right of occupancy founded thereon, could exist beyond December 1, 1902.

If the asserted right of condemnation exist, it must be because it is conferred either by State law of by act of Congress. As to the law of New Jersey there is no question, the learned counsel of the telegraph company conceding that, as to that State, the right claimed rests upon the act of Congress hereafter referred to, although "the method of making that right effective" is provided by the State statute. But as respects the State of Pennsylvania, it is contended that its law, not only only provides the mode of procedure, but also vests in the telegraph company the right to condemn which it asserted in the circuit court for the western district of that State. We cannot sustain this contention. It is based upon the supposition that the railroad company's right of way is subject to appropriation under the authority given to the Atlantic and Ohio Telegraph Company,
127 by its charter, "to erect and construct works, edifices, fixtures and structures along any of the roads, highways, streets and waters within this State." But though a railroad company is, no doubt, a "highway," it is quite clear, we think, that it is not a highway to which this grant of authority is applicable. Railroads are, it is true, subject to use for the public benefit, and, in that sense, they are public highways, but they are owned, not by the public, but by corporations, which, so far at least as ownership is concerned, are private corporations. Consequently, it could not have been intended that they should be to any extent taken without compensation, and yet no provision for compensation was made with respect to highways, although for any "land" that should be occupied, it was expressly provided that if the parties could not agree, proceedings might be taken to determine "the price or compensation to be paid * * * for such land taken or used, or the damages done thereto." The distinction thus made is obvious, and the reason for making it is apparent. Nothing was said as to compensation for roads, highways, streets or waters, because those in contemplation were only such as the State itself owned, and the use of which it might therefore grant without exacting any recompense, whereas in delegating the power of eminent domain—to appropriate "lands"—the requirement of compensation was necessarily imposed. But

even if the authority given to occupy highways was not manifestly limited—as we think it was—to the public highways of the Commonwealth, it is at least certain that no authority to enter upon the right of way of railroads was plainly and distinctly granted, and it is well settled that the right of eminent domain may be exercised by a corporation, in any case, only when granted in express terms or by necessary implication; and that property held and applied by one corporation for a public use, cannot be appropriated by another for its use, without authority clearly expressed, or which may
128 be implied from the fact (which in this case does not exist) that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. Penna. R. R. Co.'s App. 93 Pa. St., 150; Pittsburgh Junction R. R. Co.'s App. 122 Pa. St., 511; Sharon Ry. Co.'s App. 122 Pa. St., 533; Groff's App. 128 Pa. St., 621; Perry Co. R. R. *v.* N. & S. V. R. R. Co., 150 Pa. St., 193; Phillips *v.* D. W. & P. R. R. Co. 78 Pa. St. 177; Glover *v.* Beston, 14 Gray, 282.

But it is further insisted that the telegraph company having accepted the act of Congress of July 24, 1866, entitled An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes, "the actual appropriation of the railroads of the Pennsylvania Railroad Company to the use of the Western Union Telegraph Company" is thereby effected. That part of the statute which is relied upon in support of this proposition, is set out in the brief of the telegraph company, as follows:

"That any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph * * * over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress * * * provided that such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post roads."

If the question of construction thus presented were an open one, we could not yield our assent to the contention of the learned counsel of the telegraph company with respect to it. But it is not an open one. In Pensacola Co. *v.* Western Union Tel. Co., 96 U. S., 1, Mr. Chief Justice Waite, referring to this act of Congress, said: "It
129 gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business, but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporation as are willing to avail themselves of the privileges. * * * No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required it must, so far as the present legislation is concerned, be obtained by private

arrangement with its owner. No compulsory proceedings are authorized." The meaning of this language is too plain for question. If the interpretation which it attaches to the statute is to be accepted, that which the telegraph company asks this court to put upon it, is, of course, impossible. But we are asked to disregard the parts of the opinion above quoted, and other of its statements of like import, upon the ground that they "are mere dicta." This we decline to do. Careful reading of the whole report of the case, has satisfied us that, in deciding it, the Supreme Court thoroughly considered the statute and the scope of the authority conferred by it, and that in saying that "no compulsory proceedings are authorized" by it, the Chief Justice deliberately and advisedly spoke for the other members of the court as well as for himself. That it settled the law was distinctly declared in Western Union Tel. Co. *v.* Ann Arbor Rd. Co., 178 U. S., 243, where, in an opinion by the present Chief Justice, it was said:

"It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been
130 long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.' Pensacola Telegraph Company *v.* Western Union Telegraph Company, 96 U. S., 1. In that case Mr. Chief Justice Waite further said: 'No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.' * * * As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

These deliverances are conclusive. They have been so regarded by the circuit court for the northern district of Ohio (Postal Tel. Co. *v.* Cleveland, etc. Co., 94 Fed., 234), and we find nothing in any decision of the Supreme Court which indicates a purpose to repudiate or depart from them. Even if we doubted their correctness, we would feel bound to accept them as authoritative.

Having reached the conclusion that the fundamental position of the telegraph company, in each of these cases, is untena-
131 ble, no other of the points presented in argument need be considered. From what has been said it results that the

order of the circuit court for the western district of Pennsylvania must be affirmed with costs, and the decree of the circuit court for the district of New Jersey must be reversed with costs; and it is so ordered.

Bradford, district judge, concurs in the result.

Filed May 19, 1903.

132 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1903.

THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad & Canal Company, Appellants,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee. } No. 14.

Per Curiam:

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

That the order of the United States circuit court for the district of New Jersey of the 21st day of January, A. D., 1903, ordering a preliminary injunction to issue to be directed to the defendants therein, The Pennsylvania Railroad Company and The United New Jersey Railroad & Canal Company, their and each of their servants, agents and employees, restraining them and each them, their and each of their servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of The Western Union Telegraph Company, the complainant, upon the road-way and right of way of the said defendants in the State of New Jersey, as described in the bill of complaint therein, or of any of them or of any part thereof, pending the determination of the action at law referred to in the bill of complaint therein or until the further order of that court in the premises, be and the same is reversed with costs.

M. W. ACHESON,
Circuit Judge.

Philadelphia, June 11, 1903.

133 In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW Jersey Railroad & Canal Company, Appellees.

Petition for Appeal.

The above-named Western Union Telegraph Company of New York conceiving itself aggrieved by the final decree, order and

judgment entered in the above-entitled cause by the United States circuit court of appeals for the third circuit, the — day of June, 1903, hereby appeals from said final decree or order adjudging and decreeing that the order of injunction theretofore allowed by the United States circuit court for the district of New Jersey, restraining the said Pennsylvania Railroad and the United New Jersey Railroad & Canal Company, their and each of their servants, agents and employés from in any manner interfering with the use and operation of the telegraph lines of the Western Union Telegraph Company upon the roadway and right of way of the said Pennsylvania Railroad Company and the said The United New Jersey Railroad & Canal Company, as described in the bill of complaint therein, or any of them, or of any part thereof, pending the determination of the action at law referred to in the bill of complaint therein, or until the further order of that court in the premises, be reversed with costs, because, as averred in the opinion of said circuit court of appeals, the said bill of complaint of the Western Union Telegraph Company showed no equity, and that said Western Union Telegraph Company was not entitled to an injunction on the face of its said bill, under and by virtue of which judgment and decree the
134 said circuit court for the district of New Jersey would be in duty bound to dismiss said bill of complaint regardless of whatever plea, answer or demurrer the said Pennsylvania Railroad Company and the said The United New Jersey Railroad & Canal Company, or either of them, might make, file or interpose in said cause.

And the Western Union Telegraph Company prays that this, its appeal to the Supreme Court of the United States, may be allowed, and that a transcript of the record of proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, may be sent to this court.

And now at the time of filing this petition for appeal, The Western Union Telegraph Company of New York, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in this court.

And your petitioner will ever pray.

HENRY D. ESTRABROOK,
Solicitor for the Appellant, 195 *Broadway, N. Y.*

JOHN F. DILLON,
RUSH TAGGART,
R. V. LINDABURY,
Of Counsel.

Writ allowed June 17, 1903.

R. W. PECKHAM.

(Endorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, appellant, *vs.* The Pennsylvania Railroad Company and The United New Jersey Railroad & Canal Co. appellees. Petition for appeal. Filed June 18, 1903.

135 *Assignment of Errors.*

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD & CANAL COMPANY, Appellees.

Afterwards, to wit, on the 17th day of June, in the year of our Lord 1903, at the October term for 1903 of the Supreme Court of the United States at the Capitol in the city of Washington and District of Columbia, comes the said Western Union Telegraph Company by counsel and says: That in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That the Western Union Telegraph Company, having accepted the provisions and restrictions of the act of Congress, July 24, 1866, was and is entitled to maintain its lines of telegraph over and along the right of way of the defendant railroad companies upon making just compensation and so long as the maintenance of its lines should not interfere with the ordinary travel on such post roads. And the United States circuit court of appeals for the third circuit erred in holding to the contrary.

2. That said circuit court of appeals erred in reversing the judgment and decree of the circuit court for the district of New Jersey, enjoining the defendant railroad companies, and either of them, from in any wise interfering with appellant's lines of telegraph, pending the determinatiou of the court, through commissioners or a jury, as to the compensation to be made defendant railroad companies or either of them for the continued maintenance of appellant's lines of telegraph on the right of way of said defendant railroad companies, subject to the limitations of the act of Congress aforesaid.

136 3. That the reversal of the said order of injunction, made as aforesaid by the circuit court of the United States for the district of New Jersey on the ground that the rights claimed by the appellant telegraph company were not granted to it under and by virtue of the act of Congress, July 24, 1866, was a final determination of the merits of this controversy; and the said circuit court of appeals erred in refusing to make its order and decree in form and words what it was in truth and effect.

4. That the said circuit court of appeals erred in not affirming the order and decree of the said circuit court for the district of New Jersey.

Wherefore, the said Western Union Telegraph Company prays

that the judgment of the said United States circuit court of appeals for the third circuit be reversed.

HENRY D. ESTRABROOK,
Solicitor for Appellant, 195 *Broadway, N. Y.*

JOHN F. DILLON,
RUSH TAGGART,
R. V. LINDABURY,
Of Counsel.

(Indorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, appellant, *vs.* The Pennsylvania Railroad Company and The United New Jersey Railroad & Canal Co., appellees. Assignment of errors, Filed June 18, 1903.

137 Know all men by these presents, that we, the Western Union Telegraph Company, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company in the full and just sum of one hundred thousand dollars, to be paid to the said The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a regular term of the United States circuit court of appeals for the third circuit in a suit depending in said court, between The Western Union Telegraph Company, complainant and appellee, and The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company defendants and appellants a final order and decree was rendered against the said Western Union Telegraph Company, whereby an order and decree granting an injunction theretofore made by the United States circuit court for the district of New Jersey was reversed for want of equity in complainant's bill and the said The Western Union Telegraph Company, complainant and appellee in said court of appeals having obtained allowance of appeal and filed a copy thereof in the clerk's office of the said court to reverse the order & decree in the aforesaid suit, and a citation directed to the said The Penn-
138 sylvania Railroad Company and the United New Jersey and Canal Company defendants and appellants in said circuit court citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said The Western Union Telegraph Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its

plea good, then the above obligation to be void; else to remain in full force and virtue.

WESTERN UNION TELEGRAPH CO., [SEAL.]
By R. C. CLOWRY, *President.* [SEAL.]

Attest: A. R. BREWER, *Secretary.* [SEAL.]

AMERICAN SURETY COMPANY OF NEW YORK.
H. B. ZEVELY, *Vice-Pres.*
[SEAL.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

Sealed and delivered in presence of—
C. A. VAN BRUNT.

139 STATE AND COUNTY OF NEW YORK, *ss:*

On this 17th day of June 1903, before me personally appeared H. B. Zevely, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said H. B. Zevely, further said that he was acquainted with Cortlandt S. Van Rensselaer subscribed to the said instrument, — is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said H. B. Zevely, vice president.

H. J. PEIRCEY,
[SEAL.] *Notary Public, Kings County, # 5.*

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-president be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and
140 undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, ss:

I, Cortlandt S. Van Rensselaer attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at
[SEAL.] the city of New York, this 17th day of June, 1903.

CORTLANDT S. VAN RENSSELAER,
Attorney.

Approved June 17, 1903.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

141 In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH Company, Appellant,
vs.
THE PENNSYLVANIA RAILROAD Company and The United New Jersey Railroad & Canal Company, Appellees.

On Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Petition of Appellant for Order to Preserve the Status Quo Pending Hearing on Appeal by the Supreme Court of the United States.

Comes now the said appellant, The Western Union Telegraph Company, and represents and makes known to this honorable court:

1. That the Pennsylvania Railroad Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania, owns and controls a system of railroad through leases, contracts, stock ownership, etc., and that a number of the roads included in said system and so owned, controlled and operated by said Pennsylvania Railroad Company are: The Pennsylvania Railroad Company, United New Jersey Railroad & Canal Company, the Philadelphia & Baltimore Central Railroad Company, and the Philadelphia, Baltimore & Washington Railroad Company.

2. That the Western Union Telegraph Company is a corporation organized under and by virtue of the laws of the State of New York; that it owns a system of telegraph lines ramifying throughout the United States; also a system of cables connecting the continent of North America with the continent of Europe and the continent of South America; that it has 23,000 offices or more in the United States, and transmits for the general public nearly seventy millions of messages each year, exclusive of messages transmitted for the Gov-

ernment of the United States, exclusive of railroad messages,
142 exclusive of its own official messages, and exclusive of messages transmitted over wires leased to private parties.

3. That for fifty years and more the Western Union Telegraph Company, and its predecessors in title and estate, have built, owned and operated thousand- of miles of telegraph lines along the right of way of the various railroad companies so, as aforesaid, owned, controlled and operated by the Pennsylvania Railroad Company, and that all of such lines are part of its general telegraph system and are absolutely necessary for the proper and effective operation of such system and the accommodation of its telegraphic business, both for the general public and the Government of the United States.

4. That for the fifty years last past it has occupied the right of way of said railroad companies under contractual relationship with said companies whereby it not only was entitled to the use of the right of way for the construction, maintenance and operation of its lines of telegraph, but under the terms of which it had established and continued to maintain telegraph offices in the various railroad stations along the lines of said roads.

5. That several contracts heretofore made with said Pennsylvania Railroad Company and its said constituent companies, having expired by lapse of time, and the said Pennsylvania Railroad Company refusing to renew said contracts or to meet representatives of the telegraph company for the purpose of negotiating the terms of new contracts, the said railroad company has not only given notice to the telegraph company to remove its lines from its various stations, which has been done, but has ordered the telegraph company to remove all its telegraph lines from the right of way of said railroad company and each of its constituent companies, threatening
143 that unless such lines are so removed it will, through its agents, cut down and remove said lines.

6. That the principal issue in this controversy is, whether, independent of contract, the telegraph company, having accepted the burdens, restrictions and obligations of the act of Congress, July 24, 1866, is entitled to maintain and operate its lines of telegraph along said railroads as post-roads of the United States on condition that it make just compensation to said railroad company for such use, and that its lines of telegraph shall be so maintained as not to interfere with the ordinary travel on such roads.

7. That for the purpose of enforcing its rights in this respect, the Western Union Telegraph Company brought its suit against the Pennsylvania Railroad Company and the United New Jersey Railroad & Canal Company in the United States circuit court for the district of New Jersey, on the law side of the court filing a petition asking that its said right be established, and that the court summon a jury or appoint appraisers to determine the amount of compensation which the telegraph company ought to pay to the railroad company for such use, offering at the same time to secure in any manner ordered by the court the payment of such compensation,

and on the equity side of said court asking that the Pennsylvania Railroad Company and the United New Jersey Railroad & Canal Company be restrained from destroying the property of the telegraph company, pending the determination of the litigation.

8. That it filed similar suites in the United States circuit court for the western district of Pennsylvania.

9. That, upon hearing and argument, his honor Judge Kirkpatrick, sitting as a circuit judge in said New Jersey phase of this controversy, granted a temporary injunction, from which appeal
144 was prosecuted by the railroad company to the circuit court of appeals; that upon hearing and argument, his honor Judge Buffington, sitting as a circuit judge in the western district of Pennsylvania, refused an injunction and dismissed the petition filed by the telegraph company on the law side of said court, from which order the telegraph company appealed to the circuit court of appeals for the third judicial circuit.

10. That said cases, coming on for hearing and argument before said circuit court of appeals as parts of one entire controversy, were by said court considered together, and said circuit court of appeals reversed the decision of Judge Kirkpatrick on the principal ground that the facts alleged in the bill of complaint of the telegraph company did not entitle it to the relief claimed, and that under the act of Congress, July 24, 1866, the telegraph company had no right to the use of a railroad right of way on any terms whatsoever except by and through the consent of the railroad company; and for like reasons the said court sustained the decision of his honor Judge Buffington, from which judgment of the circuit court of appeals for the third judicial circuit these proceedings on appeal and in error are prosecuted to this honorable court, where the matters and issues in controversy will be finally determined.

11. That immediately after the circuit court of appeals had given its opinion aforesaid and before this petitioner could apply to said court of appeals for an order to stay pending an appeal to the Supreme Court of the United States, the said defendant, The Pennsylvania Railroad Company, on the — day of May, 1903, with preconcerted and sudden force and violence, and with a multitude of persons armed with axes and other tools of *s*etruction, and thereunto commanded by the said Pennsylvania Railroad Company, took forcible and violent possession of the lines of telegraph then
145 in the peaceful and quiet possession of this petitioner, and cut down and destroyed the telegraph poles and detached therefrom the telegraph wires and instruments belonging to this petitioner, thereby destroying property that had cost petitioner in its creation more than one million dollars.

12. That thereupon your petitioner made application to said circuit court of appeals in this cause, proposing the form of final order to be entered by said court and praying an appeal to the Supreme Court of the United States from such order, and likewise praying that said court order the preservation and maintenance of the *status quo* of the property involved in this suit pending this appeal, or

until this court should order to the contrary, and offering a bond in whatever amount said court might order conditioned that this petitioner should prosecute its appeal with all diligence and answer in damages in case it should fail to make good its appeal, and filed in support of its application a brief, copy of which is hereto attached marked "Exhibit A."

That the Pennsylvania Railroad Company opposed this petitioner's said application and further proposed an order to be entered in said cause, and answered the brief of your petitioner, copy of which said brief is hereto attached marked "Exhibit B."

13. That said circuit court of appeals, without in any wise passing upon your petitioner's application for an order to preserve the *status quo*, entered its decree in the form and manner proposed by said Pennsylvania Railroad Company, being the decree from which this appeal is prosecuted

14. That afterwards—to wit, about noon of Saturday, June 13, 1903, the Pennsylvania Railroad Company, through its proper officers, proposed to the Western Union Telegraph Company to purchase its lines of telegraph, being the property here in-
146 volved, at a fair valuation and requiring an answer accepting its proposition by noon of the Monday following, to wit, June 15, 1903, threatening that unless your petitioner would so consent to sell its property it would remove the same from its right of way; that to this proposition your petitioner replied in the forenoon of the Monday aforesaid that under the circumstances it would sell its said property at an appraised value, conditioned that if it should make good its asserted rights under the act of Congress, July 24, 1866, such sale should be void; copies of the foregoing correspondence are hereto attached and marked "Exhibit C."

15. Your petitioner avers and makes known to this honorable court that it has little hope or expectation that its proposition to sell, conditioned as aforesaid, will be accepted by said railroad company, and your petitioner aver- that, unless so accepted or unless the said railroad company be restrained by the order of this court, it will cut down, remove and destroy all the telegraph lines of your petitioner now maintained and operated along and upon the United New Jersey Railroad & Canal Company in the State of New Jersey to its irreparable and irretrievable injury.

16. Your petitioner avers that it has diligently and with all expedition prosecuted its claim of right, as aforesaid, through the various courts to this court of last resort; that it honestly believes itself entitled to the rights claimed by it, and that it has not instituted these proceedings for the purposes of delay, and that it will continue to prosecute this, its said appeal, diligently and to effect; and that if, upon the consideration of this honorable court, the judgment of the circuit court of appeals, from which this appeal is prosecuted, shall be affirmed, it will, as best it may and in whatever time this honorable court may allow to it, remove its lines of tele-
147 graph from the right of way of said Pennsylvania Railroad Company and its constituent companies.

17. Your petitioner further avers that, while the lines of telegraph which, by order of this court, it is seeking to preserve pending this appeal, are of great value in actual cost of construction, and of even greater value considered as parts of its entire telegraphic system, said property, consisting almost wholly of lines and poles, if cut out of its system and no longer standing as working parts of said system, but considered solely as second-hand wire and cordwood, would be of relatively little value; and your petitioner avers and makes known unto this honorable court that, if the said Pennsylvania Railroad Company shall be permitted to carry out its threats and destroy and remove petitioner's lines of telegraph, great and irreparable injury will be caused to your petitioner, great inconvenience will be occasioned the general public and the Federal Government; no injury whatever will be done to or occasioned the said railroad company if the *status quo* is preserved and maintained pending this appeal.

Wherefore, your petitioner prays this honorable court that it will grant unto your petitioner, upon such terms as it may see fit to impose, an order that the *status quo* pending this appeal be respected and maintained by the parties hereto.

JOHN F. DILLON,
RUSH TAGGART,
HENRY D. ESTRABROOK,
For Petitioner.

R. V. LINDABURY, *Of Counsel.*

148 STATE OF NEW YORK, } ss.:
County of New York, }

Robert C. Clowry, being first duly sworn, deposes and says: That he is president of the foregoing petitioner, The Western Union Telegraph Company; that he has read this petition, is acquainted with its contents, and that the facts therein set forth are true.

ROBERT C. CLOWRY.

Subscribed in my presence and sworn to before me this 17th day of June 1903.

CHARLOTTE A. VAN BRUNT,
Notary Public, Kings County, No. 4.

Certificate filed in New York county.

149 United States Circuit Court of Appeals for the Third Circuit.

PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW Jersey Railroad and Canal Company, Appellants,
vs.
WESTERN UNION TELEGRAPH COMPANY, Appellees.

Appellants' Motion for an Order.

The order prayed for by appellants is printed at the end of this brief.

Brief of Appellants in Opposition of Application by Appellee to Settle Form of Order.

We submit a few observations under three heads:—

I. No final decree should be entered.

II. There is no right of appeal to the Supreme Court of the United States.

III. No order of supersedeas should be granted.

This case was argued in the court below, upon application by the complainant for a preliminary injunction. Affidavits were presented on behalf of the defendants, addressed to but few of the facts averred. It was not deemed necessary in resisting that ap-
150 plication, to challenge by contradictory averments such as could have been made, more than a few of the allegations of the bill. These, for the time, were allowed to pass without notice, the defendants intending, in their answer, to contradict them.

It would be manifestly unfair to permit the appellee to present its case to the Supreme Court of the United States upon final hearing upon a statement in its bill of facts which could, and which will, be contradicted. Such a course of procedure would entail upon a defendant in equity in resisting an interlocutory order, the duty of disclosing all the details of its defense.

The demand of the appellee is equally lacking in merit, whether considered from a legal point of view or from the standpoint of fact. There is no necessity for the use by the telegraph company of the appellants' right of way. All its business can be transacted by it on its lines otherwise located. Its sole desire, appellants believe, is to interfere with them in carrying out their plans for the use of their right of way, for their own telegraph purposes. They believe that their corporate purposes, as well as the public interests, will be furthered, by carrying out the contract with the Postal Telegraph Company.

The taking of the portion of their right of way proposed by the appellee, would most seriously incommode them, and would interfere with the ordinary travel upon their road.

It is the right of every defendant to determine whether he will demur, or make answer to a bill. It has always been the intention of these defendants, when it should become necessary for them to plead, to make full answer to all the averments made by the appellee, and to present to the court a defense upon the law as well as upon the facts.

The granting of the motion prayed for by the appellee would deprive them of their rights in this respect, and would give to the appellee an unfair advantage in the Supreme Court, which, hearing the cause upon appeal as from a final decree, made upon a partial presentation of the truth, would approach it from a point
151 different from that occupied by this court when it heard an appeal from a mere interlocutory order, made upon *ex parte* affidavits.

If the appellee succeeds in obtaining the entry of a final decree upon the pleadings as they now stand, and if it succeeds in convincing the Supreme Court of error in the decision by this court, the controversy will begin, not end, with the decree of that court. It will be necessary to remand the case to the circuit court, with instructions to permit the defendants to answer. The controversy will then start anew. The result will be that it will be necessary for the defendants to be embarrassed by two hearings in the Supreme Court of the United States, instead of by one.

The appellants protest against the delay which would result from their being subjected to the necessity of thus waiting for the determination of two appeals, before they can be relieved of the nuisance of appellee's poles and wires located in a space imperatively needed by them for other uses.

If this controversy must go to the Supreme Court of the United States, the appellants insist that it shall there be heard after they have been allowed all the rights accorded defendants in a court of chancery.

In the court below, had no special injunction been granted, the appellants would have had an absolute right to demur or to answer. Have they lost this right because of the improvident grant of a special injunction? Why should the telegraph company, after having availed itself of the long delay which this injunction afforded it, be allowed any further advantage by reason thereof?

In the cases cited by the appellee, viz: Stover Manufacturing Company *vs.* Mast, 177 U. S., 485, and in the still later case, Brill *vs.* Peckham, 23 Supreme Court Reporter, 562, it would seem that the defendants acquiesced in, perhaps requested, the entry of a final decree. In the absence of any objection by them, the complainant was not aggrieved by the entry of a decree which rested upon the fact that upon the best presentation of his case possible to
152 him, he had demonstrated its legal insufficiency. If this controversy is to be determined by the Supreme Court of the United States, the appellants wish it to be heard upon their whole defense: (1) A lack of any right to condemn conferred by the act of 1866; (2) a need by them of their whole right of way for their own

legitimate purposes; and (3) the preposterous character of the pretensions of the appellee.

At this time and to this court, the appellants make no request that the bill of the appellee shall be dismissed. If any purposes or desires of the appellee will be furthered by such dismissal, it can readily gratify them, after the record has been returned to the court below, by its own unaided action, in entering a discontinuance.

II. There is no right of appeal to the Supreme Court of the United States.

The effort of the appellee to procure the entry of a final decree upon an interlocutory motion, is a concession of the fact that no appeal lies to the Supreme Court of the United States from a refusal to grant a special injunction or from a reversal of an order which granted such injunction. The act of February, 1895, see c. 96, which authorized appeals from interlocutory orders or decrees, dissolving or refusing to dissolve an injunction, was superseded by a subsequent amendment. (See vol. I., Compiled Statutes of the United States, 1901, page 551.)

The decrees of the circuit court of appeals are final, "in all cases "in which the jurisdiction is dependent upon the opposite parties to "the suit or controversy being aliens and citizens of the United "States or citizens of different States."

No jurisdiction was vested in the circuit court of New Jersey, excepting by reason of the fact that the parties were citizens of different States. No Federal question was involved. This was determined in Ann Arbor Railroad Company *vs.* Western Union Telegraph Company, 178 U. S., 239. In that case the Supreme Court, upon its own motion, dismissed the proceedings for want of jurisdic-
153 tion, because a citizen of Ohio had removed to the United States circuit court of Ohio, a suit brought against it by a citizen of New York, after denying the claim that it had jurisdiction because a Federal question was involved, although, in the bill in that case filed, it was claimed that under the act of 1866 there was a right of eminent domain exercisable upon the railroad company's right of way. The Supreme Court, speaking through the Chief Justice, said:—

"As we have said, it was not asserted in argument that the tele-"graph company had the right, independently of the contract to "maintain its line on the railroad company's property, and in view "of the settled construction of the statute (the act of 1866) we could "not permit such a contention to be recognized as the basis of juris-"diction."

No appeal lies, therefore, (1) because the decree dissolving the special injunction is interlocutory, and (2) because what would otherwise be a Federal question as to the power conferred by the act of 1866 has been conclusively settled, and is not, therefore, open, even upon appeal from a final decree.

III. No order of supersedeas should be granted.

By its contract the appellee expressly agreed that at the expiration of six months' notice it would remove "all of its poles and wires

"and leave the property of the railroad company in good condition "and free from the incumbrance thereof to the satisfaction of the "general manager or other proper officer of the railroad company, "and if not so removed the railroad company may remove them "at the expense of the telegraph company."

The requisite notice was given. The six months expired 1st December, 1902. An injunction was granted by Judge Kirkpatrick, not because of his conviction of any right existing in the appellee, but because of his desire that the matter should be determined by this court, without intermediate disturbance of poles and wires. Although no injunction was granted by the circuit court of the western district of Pennsylvania, in view of the fact that the
154 question was pending in this court, the Pennsylvania Railroad Company, in the State of Pennsylvania, delayed its action.

This court determined, nearly six months after the expiration of the time during which it was the duty of the appellee to remove, that the latter had no right, under the act of 1866, to appropriate the railroad right of way.

The duty of the appellee under its contract to remove was plainly expressed. Even if entitled to exercise the right of eminent domain, it was not justified in refusing to perform its contract, but was compelled to proceed *de novo*. Only after judicial determination of the existence of its right, and after the entry of the proper security, could it erect its poles and string its wires.

The right alleged to exist under the act of 1866 was not one to retain, but, after appropriation of the right of way in accordance with law, *thereafter* to erect.

In the case of any other telegraph company asserting an alleged right of eminent domain, it would have been necessary to establish (1) that the act of 1866 permitted an appropriation and (2) that such appropriation would not "interfere with the ordinary travel" of the railroad. In the case of such other telegraph company, asserting such right, after an answer by the railroad company denying (1) the right to appropriate and (2) asserting that the appropriation would interfere with its use of its railroad, there could have been no entry until the question of law, and that of fact, had been finally determined.

The appellee sought to gain for itself an unconscionable advantage, by retaining a possession it had agreed to abandon, and thus, in anticipation of, and without performance of the pre-requisite conditions, to prevent the railroad company from operating its railroad. It sought to secure, before it had established its right, either in law, or in fact, what was not possible in the case of any other telegraph company. It tried to substitute for its duty to remove, an obligation on the part of the railroad company to permit an occupancy, in advance of any establishment of its right.

155 During nearly six months which have elapsed since the expiration of the period in which it was the duty of the appellee to remove, the appellants have been subjected to very great

inconvenience and pecuniary loss, and have been prevented from carrying out a contract made with the Postal Telegraph Company, necessary for the conduct of their business. Without payment of any consideration, the appellee has continued to use the railroad right of way.

There can be no doubt, judging by the published statement of the president of the corporation appellee, that it has prepared itself to conduct its whole business upon its other lines without loss to itself, or inconvenience to the public. It retains possession of the right of way of the appellants, more with a view to interfering with them in doing what they have determined upon, than for any other reason. The appellants are exposed to extreme inconvenience and loss by reason of the retention of the poles and wires. The pecuniary loss on this part of the railroad system is nearly $75,000 per annum.

Why should the appellee be permitted, in violation of its contract to remove, to gain an unconscionable advantage, not open to any other telegraph company claiming a right under the act of 1866, at the expense of the appellants, and to subject them to an inconvenience which cannot be overestimated?

The appellants cannot, without waiving their notice, accept any telegraphic service from the appellee. They are prevented from carrying out their contract with the Postal Telegraph Company. It is impossible for them to obtain the needed telegraphic service in the transaction of their business, inasmuch as a third line of wires and poles cannot be erected upon the right of way. The whole available space is occupied by the appellee.

The proposed order of *supersedeas* would grant to the appellee an injunction against the removal of the wires and poles until a final determination in the Supreme Court of the United States of a case in which that court has no appellate jurisdiction.

156 Even if such appellate jurisdiction exists, the *supersedeas* will operate as an injunction until the lapse of probably fifteen months before the appeal can be heard. Should the Supreme Court declare in favor of the right to appropriate under the act of 1866, the case must be remanded to the circuit court for further proceedings, which will involve a second appeal and several years' additional delay. The grant of a *supersedeas* will give from two to three years' gratuitous occupancy by the appellee of the right of way of the appellants. This court, which has held that no right exists in the appellee, will have rewarded it for its breach of its covenant to remove, by giving it for nothing a right of occupancy for which it paid a large annual amount during the continuance of the contract.

To grant the prayer of the petition will practically be to say, in every case in which the circuit court and the circuit court of appeals shall be of the opinion that no injunction shall be granted, that such injunction, indirectly, by the allowance of a *supersedeas*, shall be issued, until the Supreme Court of the United States can finally pass upon the rights of the parties. In the present case, this *supersedeas* will be granted, although the right asserted is one which has been

decided by the Supreme Court to be so non-existent, that it is not one open to discussion.

In conclusion, it may be not amiss to notice what is said to the effect that there has been "reckless and wanton destruction of the "property of the appellee."

The property referred to, alleged to have been recklessly and wantonly destroyed, was practically valueless as second-hand material, if removed. The destruction of value which must result from a removal must have been considered by the telegraph company when, in 1881, it agreed to remove after the expiration of six months' notice.

On the 5th July, 1902, a communication was sent to the telegraph company—

"To avoid unnecessary loss to your company incident to the re-
"moval of your poles and wires, we are willing to purchase at a fair
"valuation such of the lines as we can make use of, and, if
157 "you desire to take up this question Mr. Charles M. Schaffer,
"superintendent of telegraph, will hold himself in readiness
"to meet a representative of your company to agree upon the price
"of such lines."

No attention was paid to this offer.

The poles and wires were allowed to remain upon the railroad right of way in Pennsylvania notwithstanding the fact that no injunction had been granted, because of the willingness of the railroad company that this court should finally pass upon the question before it exercised its right to remove.

The notice to remove was given in May, 1902. It was followed up, within a month, by a notification to the telegraph company that a new contract had been made with the Postal Telegraph Company for the doing of the necessary telegraphic services of the appellants, which would render it necessary that the right of way should be cleared. Instead of applying immediately for an injunction, the appellee waited until the notice was just expiring, and thus by reason of its delay, greatly prolonged the legal determination of the right it set up.

Had the telegraph company, when this court settled the controversy, suggested any desire to remove its wires and poles, every courtesy would have been accorded to it. Instead of doing this, it promptly served notice that it would *continue* by dilatory proceedings, pending its illegal occupancy.

Nothing remained for the railroad company, after the case had been finally determined, unless prepared to wait indefinitely and to enjoin itself when the court said it should not be enjoined, but to assert its rights. Its operations were hampered and it was without necessary telegraph facilities.

The property was old and practically valueless. The telegraph company, as its president has admitted, had otherwise arranged to do its business. It was necessary for the railroad company to finish the removal as rapidly as possible. The method of removal was

one which fairly conserved the trifling value of the property as second-hand material, without unnecesseary expense.

158 The appellee claims to possess the right, *invitum*, to oc-upy forever, for its purposes, a considerable portion of the right of way acquired by the appellants, by an immense expenditure. The Supreme Court of the United States has twice decided that such right does not exist, stating, on the last occasion, that the question had been so settled that it would not permit it to be raised.

This court, without dissent, has also denied the existence of such right. The appellee under obligation to remove its poles and wires which, for six months, has illegally continued to obstruct the right of way of the appellants, and has interfered with its use for the public purposes for which it was intended, now demands a judicial prohibition, which will last for years, of performance of its covenants, concededly broken, until it can have determined its right to enter *invitum*. This demand is made, although, in the Ann Arbor case, it admitted, through its counsel, it had no such right.

If the Supreme Court of the United States can be induced to reverse its decisions, and to accord the right to enter to the appellee, it will thereafter be at liberty to do everything open to any other telegraph company. Upon filing its bond and perfecting its preliminary proceedings, it can then enter. All it will have lost will have been the advantage which would have accrued to it from a judicial sanction of its refusal to carry out its agreement to remove.

Whilst a special injunction sometimes interferes with the enforcement of rights which, upon final hearing, are proven to have existed, it is limited in its possibility of injury by the requirement of adequate security and by a determination by the chancellor granting the same that there is legal merit in the complainant's contention. The appellee, which has been found entitled to no injunction, now demands that upon entering its bond in the penal sum of $1000 it shall be awarded a *supersedeas*, which will give it all the advantages of an injunction without exposing it to any pecuniary loss, in a case in which it has not even a *prima facie* right.

159 If the motion prevails it will be found better in the future for a complainant to fail in its motion for an injunction, inasmuch as a *supersedeas* will accomplish all the purposes of such injunction without necessity of establishing a shadow of right and without subjecting it to any pecuniary responsibility.

We pray that the court will make the order attached hereto.

JAMES B. VREDENBERGH,
JOHN G. JOHNSON,
For Appellants.

160 United States Circuit Court of Appeals, Third Circuit. In Equity.

THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Appellants, *vs.* THE WESTERN UNION TELEGRAPH COMPANY, Appellee.	March Term, 1903. No. 14.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz:—

That the order in the United States circuit court for the district of New Jersey, of the twenty-first day of January, A. D. 1903, ordering a preliminary injunction to issue to be directed to the defendants therein, The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, their and each of their servants, agents and employees, restraining them and each of them, their and each of their servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of The Western Union Telegraph Company, the complainant, upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the bill of complaint therein, or of any of them, or of any part thereof, pending the determination of the action at law referred to in the bill of complaint therein, or until the further order of that court in the premises, be reversed with costs.

161 United States Circuit Court of Appeals for the Third Circu —— Term, 1903.

THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Appellants, *vs.* THE WESTERN UNION TELEGRAPH COMPANY, Appellees.	Application by Appellee to Settle Form of Order and Brief in Support.

Brief.

On the right and duty of the court to enter the order and decree herewith submitted, and allow an appeal therefrom to the Supreme Court of the United States; and on the right and duty of the court, pending the appeal, to order the continuance and maintenance of the status quo. (*Proposed order or decree will be found at end of brief.*)

162 I.

The right of the court of appeals to determine the entire controversy on appeal from an order allowing a temporary injunction.

May it please the court:

The principal question at issue between the parties to this controversy, considered as a whole is, Has the complainant telegraph company the right to occupy with its telegraph lines the right of way of the defendant railroad company under and by virtue of a grant of Congress, July 24, 1866? This court, affirming the decision of the district court for the western district of Pennsylvania, holds that complainant's claim of right under said act of Congress is not warranted by the provisions of that act, and that the Supreme Court of the United States has so decided. This is disputed by the complainant, and it is evident that the controversy must ultimately be determined by the Supreme Court of the United States, itself, which will be called upon to interpret its own rulings on the act in question.

The good faith of complainant's purpose to have this done is not drawn in question. The reckless and wanton destruction of its entire property, covering the railroads owned and operated by the defendant railroad company, will not deter complainant in the prosecution of this purpose. We assume that in creating a tribunal of last resort, and giving parties litigant the right through intermediate stages to appeal thereto for the final determination of their controversies, it was the intention of the law that the subject matter of the litigation should be turned over to such ultimate authority, and that it should not evaporate *en route*.

163 That such protection of property involved may be conditioned upon the prompt prosecution of an appeal and the giving of adequate security to answer a failure in this regard, goes without saying. The present controversy between the parties to this suit can be heard and determined by the Supreme Court of the United States in a very few months at most, when, if it affirms the decision of this honorable court, it may turn complainant over to the tender mercies of the defendant, or suffer complainant to remove its lines of telegraph from the property of the defendant railroad company decently and in order, within a time and upon conditions to be prescribed by that tribunal.

It seems to us inconceivable that, considering the value of complainant's property as situated and its almost total lack of value as second-hand material, and considering, furthermore, the public and governmental functions which it fulfills, complainant may not hope to be protected by the courts pending the determination of its rights in the court of last resort. That this honorable court has the inherent power to afford such temporary protection, and that it is its duty, notwithstanding its adverse opinion on the merits of the controversy, to afford such protection, is established by overwhelming authority, with no case, so far as we can discover, to the contrary.

This honorable court has declared in its opinion that the fundamental position of the telegraph company, both in its petition for condemnation and in the bill of equity in support thereof, is untenable, which can only mean that, in the opinion of this honorable court, the bill of complaint does not state a cause of action, is amenable to demurrer and should be dismissed for want of equity. Such being the conclusion of this honorable court, we respectfully
164 submit that it is a determination of the merits of this controversy which should find expression in an order to the circuit court to dismiss complainant's bill for want of equity, thus enabling complainant to appeal to the Supreme Court of the United States. That the United States circuit court of appeals has the right, under the Everett's act, on an appeal from the allowance of a temporary injunction, to determine the merits of the controversy on the bill filed is no longer open to question.

In Stover Mfg. Co. *vs.* Mast, Foos & Co., 89 Fed. Rep., 333, the circuit court of appeals for the seventh circuit, in dissolving an interlocutory order of injunction against the infringement of letters patent, concluded its opinion as follows (p. 340):

"It is not perceived that further proofs are are possibly of a character to change the result. The decree or order below is, therefore, reversed, *with directions to dismiss the bill for want of equity.*"

On *certiorari* from the Supreme Court of the United States (177 U. S., 485), it was said (p. 494) by Mr. Justice Brown on behalf of a unanimous court:

"One of the principal questions pressed upon our attention related to the power of the court of appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.

"This question is not necessarily concluded by Smith *vs.* Vulcan Iron Works, 165 U. S., 508, since in that case the interlocutory injunction was granted after answer and replication filed, full hearing had upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages.

"In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction, *because his bill was devoid of equity, such court might, to save the parties from*
165 *further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.*

"Does this doctrine apply to a case where a temporary injunction is granted *pendente lite* upon affidavits and immediately upon the filing of the bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete, if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstance of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for

a full hearing upon pleadings and proofs. *But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment*; or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, *to save a protracted litigation, the court may not order the bill to be dismissed.* Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are *entitled* to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity causes. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and, giving them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the court should not only overrule the order for the injunction, *but dismiss the bill.* * * * The power was properly exercised in this case."

Here, it will be observed, the circuit court of appeals passed upon the merits of a controversy on an appeal from an interlocutory order of injunction *against the protest of the complainant who claimed that he was entitled to have the case remanded.* In the case at bar the complainant, *having made its full case upon its bill and this court being fully persuaded that such bill does not entitle it to an injunction*, is respectfully insisting that the order entered should conform to
166 the opinion of the court, so that an immediate appeal can be prosecuted to the Supreme Court of the United States.

II.

The preservation of the *status quo* pending appeal.

It seems to us desirable on all accounts, public and private, that the issues in this cause should be speedily determined by a court of last resort; and it seems to us equally clear that the rights involved and the property at stake should be turned over to that court without diminution, to be finally dealt with as that court may determine.

To be sure, in reversing the interlocutory order of injunction granted by the circuit court for the district of New Jersey, this honorable court does not *affirmatively* declare the right of the defendant company to destroy the property of the complainant or recover possession of its property, hitherto occupied by the complainant, *vi et armis;* but it is evident from recent manifestations that, without resort to legal proceedings, the defendant will, unless restrained, so recover possession of its property and destroy and annihilate the property of the complainant, unless met by overwhelming physical resistance by the complainant. Such a method of asserting or defending rights commends itself neither to the sober judgment of a court nor to the duties of good citizenship.

If great corporations, employing thousands of laborers, are
167 permitted to take the law into their own hands, and vindicate an alleged right by force of arms and wager of battle, shall

we blame their employees for doing the same? In the meantime, the average citizen is apt to ask, "What are the courts for?"

It nowhere appears in the record of this case that the lapse of a few weeks, or months at most, can work irreparable injury to the defendant. It does appear that the destruction of complainant's property by violence, not only inflicts irreparable injury upon the complainant, but robs the Supreme Court of the United States of jurisdiction over everything save the abstract questions of law involved. The right of appeal becomes an empty right.

In Hovey *vs.* McDonald, 109 U. S., 150, it was held that a decree in equity dissolving an injunction is not affected by a supersedeas, *unless the court below order the continuance of the injunction pending appeal;* that whether this should be done depends upon the facts of the particular case. Mr. Justice Bradley, on behalf of a unanimous court, says:

"The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy."

After referring to the law of England on the subject, the learned judge adds:

"In this country the matter is usually regulated by statute or rules of court and, generally speaking, an appeal upon giving the security required by law (when security is required) suspends further proceedings and operates as a supersedeas of execution. This, as we have seen, is the case in the circuit courts of the United
168 States. But the decree itself, without further proceedings, *may have an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree or of the appellate tribunal.*"

The learned judge further says:

"It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a sepersedeas were complied with. It was *not* decided that the court below had no power, *if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered.* * * * Judging only from what appears in the record, we cannot refrain from saying that in this case the latter course would have been eminently proper. It would have protected all parties and produced injury to none."

In Bronson *vs.* La Crosse R. Co., 68 U. S. (1 Wall.), 405, the Supreme Court of the United States, by Mr. Justice Nelson, says, (p. 410):

"To guard against misconstruction *in respect to the powers of a*

court having jurisdiction over the subject matter, and where a decree has been rendered affecting the property in litigation—the road in this case—and an appeal is taken to this court, as the property in controversy is not brought into the appellate tribunal, but remains in the custody and care of the court below, *it is agreed that full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss.*"

In Cotting *vs.* Kansas City Stock Yards Co. (82 Fed., 850), Judge Thayer, dissolving a temporary injunction and dismissing complainant's bill of complaint, nevertheless made an order to preserve the *status quo* pending appeal. The learned judge says (p. 857):

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of
169 the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said, in substance, by the Supreme Court in Hovey *vs.* McDonald, 109 U. S., 150, 161, *it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right.* The court is of opinion that the cases at bar are of such moment, and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, *yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted, for the term of 10 days, and if, in the meantime, an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the Supreme Court of the United States: Provided that, in addition to the ordinary appeal bond, the Kansas City Stock Yards Company shall make and file in this court its bond in the penal sum of $200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that, in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kan., and Kansas City, Mo., which it may have exacted in violation of sections 4 and 5 of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to wit, on April —, 1897, and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal; said obligation to become void if the statute in question shall be pronounced invalid by the Supreme Court.*"

In Staffords *et al. vs.* King, 90 Fed., 136, the circuit court of appeals for the fourth circuit held that

"while an appeal from an order dissolving an injunction, though with a supersedeas, does not reinstate the injunction in force, *yet the*

court may, in its discretion, do so by an affirmative order; and where, in the order allowing the appeal and supersedeas, the court
170 provided that pending such appeal, the order dissolving the injunction should stand suspended and superseded; and after a decision by the circuit court of appeals affirming the order of dissolution, but before its mandate had been sent to the circuit court, the cause and record were removed to the Supreme Court by a writ of *certiorari*, the injunction remains in full force and must be respected and enforced until final disposition of the case in the Supreme Court."

In Mining Co. *vs.* Mining Co., 5 Utah, 182, (12 Pac., 660), the second syllabus reads as follows:

"An appeal from the supreme court of Utah Territory to the Supreme Court of the United States must be taken in the same manner and under the same regulations as from the circuit courts of the United States. *The supreme court of the Territory, therefore, possesses the power to make an order of injunction preserving the status quo until a decision be made in the Supreme Court of the United States.*"

After considering the case of Hovey *vs.* McDonald, *supra*, and several other decisions, the court say (5 Utah, p. 185):

"Speaking with respect to appeals from the circuit courts of the United States and other courts, in the case of Hovey *vs.* McDonald, *supra*, the court held that power undoubtedly exists to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. * * * *In this grant of power it appears reasonable that the authority should be implied to restrain the effect of the judgment appealed from so as to preserve the subject of litigation for disposition according to the final judgment of the appellate court. The object of the appeal is not to give that tribunal of last resort merely an opportunity to make a vain display of its power and wisdom.* The appeal in this case was given that the parties might have their rights to the property in question determined, and that it might be given to the one entitled to it as finally decided. If, when that decision shall be made, the property shall be beyond the effect of the decree and the process of the court, and the party to whom it may be adjudged does not get it, *the purpose of the appeal will have been defeated, and the ends of justice will not have been reached.*"

171 In Hart & Hoyt *vs.* Mayor, etc. of Albany, 3 Paige Chan., 381, there was an appeal from the decision of Chancellor Walworth, denying an injunction to restrain a corporation of Albany and their dock master from removing from the Albany basin an ark, or floating storehouse, which the complainants had erected and moored therein, contrary to an ordinance of the corporation (see same volume, p. 213). The defendants, pending the appeal, were proceeding to carry into effect the ordinance of the corporation, by removing from the basin the ark or floating storehouse referred to in the bill. To effect this object it would be necessary to destroy the storehouse by taking it to pieces. The complainants presented a

petition to the chancellor, stating these facts; and also stating that the appeal was brought in good faith, for the purpose of settling the rights of the parties; that the destruction of the ark or storehouse would be a very serious injury to the complainants, if they succeeded in their appeal; but that it could not be of any material damage to the defendants or the public to have it remain in its present situation, until the decision of the court of errors upon the questions in controversy between the parties. The petitioners, therefore, asked for an order restraining the defendants from proceeding under the ordinance of the common council, pending the appeal.

Says Chancellor Walworth, to whom the application was made (p. 382):

"It is supposed by the complainant's counsel that the appeal from an order dissolving an injunction has, under the provisions of the Revised Statutes, the effect of nullifying the order pending the appeal, so as to prevent the dissolution of the injunction and to deprive the defendants of the right to go on with their proceedings under the law of the corporation, or to do any act contrary to the
172 prohibition contained in the injunction. But if they should be wrong in their construction of the statute, the complainants then ask the court to exercise *a judicial discretion*, under the peculiar circumstances of this case, *and that they may have an order in the nature of a temporary injunction to stay the proceedings of the defendants pending an appeal, so as to give the appellants the benefit of the decision of the court for the correction of errors, if it should be in their favor.*"

After stating that the appeal did not suspend the order for the dissolution of the injunction and reviewing English authorities and the history of the practice on appeal, the learned chancellor says (p. 385):

"Having arrived at the conclusion that the provisions of the Revised Statutes do not suspend the operation of the order appealed from, so as to restore the injunction and entitle the appellants to an order to stay the proceedings of the defendants as a matter of strict right, it becomes necessary to inquire whether this court has the power to suspend the operation of the order until under the decision of the court for the correction of errors on the appeal; and if it has such power, whether this is a proper case for the exercise of the judicial discretion of the chancellor in this respect. As the application here is not to stay any proceeding in the suit, but to restrain a proceeding by the defendants out of court, the granting of the order will unquestionably be an original exercise of judicial power over the parties in the cause. *Such power, however, is frequently exercised by the superior courts over the suitors and parties therein for the advancement of justice;* and the granting a preliminary injunction in this court, before the rights of the parties are finally determined, always proceeds upon the same principle. The only reasonable ground of objection to such a proceeding, therefore, is that it seems inconsistent for the court to make an order to restrain a party from proceeding, after it has, upon a full hearing of both parties, decided

that he has both a legal and equitable right to proceed. But this objection would equally apply to all the orders in the English court of chancery to stay the proceedings on a decree or order of the court by which the rights of the parties have been established by the same court. * * * *If the decision of this court was wrong, it may prevent an unnecessary sacrifice of property, and save future litigation, to re-*
173 *strain the defendants from proceeding until after the next session of the court for the correction of errors. If, therefore, the complainant's solicitor will stipulate to expedite the proceedings on the appeal, so as to enable the respondents to bring the same to a hearing at the next August term of that court, a temporary injunction must be granted, restraining the defendants from destroying the ark or storehouse, or from taking it to pieces or removing it from the basin, until after the session of the court for the correction of errors in December next; unless the appeal shall be sooner dismissed or otherwise disposed of by that court.*"

In Jewett *vs.* Albany City Bank, Clark's Ch. Rep., 57, it was held, after the dissolution of a temporary injunction (p. 60):

"I am not prepared to say that they (the obstacles in question) are insurmountable, but they are sufficiently formidable to prevent granting the order, unless *great and irreparable mischief would follow from its refusal.* Such was the case in Hart *vs.* The Mayor of Albany. There would have been a destruction of property which could not be restored."

In Waterman *vs.* Raymond, 5 Wis. Rep., 185, there was an order made by one of the justices of the supreme court at chambers, staying the action of the parties litigant until an appeal taken by the defendants should be heard and determined in the supreme court. On motion to vacate this order it was held (p. 186), *per curiam:*

"*Undoubtedly this court has the power to order a stay of proceedings in the court below touching any matter of appeal to this court.* As we have no doubt that a justice of this court has the power in vacation to make a provisional order for such stay of proceedings, to enable the party to make or renew, if need be, a similar motion in term. * * * No fixed rule can be laid down, but the action of the justice or court must depend upon the equities of the particular application, *and where great or irreparable injury is liable to result from the prosecution of the cause, after an appeal from an interlocutory order, the power ought to be exercised.*"

174 In Hudson *vs.* Smith, 9 Wis., 122, suit was brought by the plaintiff below to recover of the defendants below possession of the gas works in the city of Janesville. An order was made by the judge of the circuit court that a receiver be appointed. From this order an appeal was immediately taken and perfected. The judge, however, proceeded under the order to the appointment of the receiver, when an application was made to him by the appellants to fix the sum in which an undertaking should be executed in order to stay proceedings under the provisions of section 2, chapter 130 of the Laws of 1859. This he refused to do, holding that this

section was intended to apply only to actions brought for the recovery of money.

The appellants then moved the Supreme Court to compel the circuit judge by mandamus to fix the amount of such an undertaking; or to make an order itself, staying the proceedings, offering at the same time to give bond in such sum and with such condition as the Supreme Court should direct. Without deciding whether the appellants were entitled to a stay under the provisions of the act of 1859, before referred to, the Supreme Court granted an order, staying appellants on the appellants filing an undertaking in the sum of $10,000, conditioned to pay and abide by any judgment that finally might be rendered in the suit. The defendants moved to vacate this order, and several questions were discussed, among which were the following: 1. Whether the appellants were entitled to a stay of proceedings under the act of 1859. 2. Whether, if not, the perfecting of the appeal itself worked a stay; and, lastly, if it depended entirely *on the general power of this court to stay proceedings in*
175 *any matter appealed to it, which power was conceded*, whether the court ought in this case to continue the order in force.

Say the court:

"It is undoubtedly the general policy of the law to allow any party against whom judicial proceedings are commenced to stay proceedings under the decision of any inferior tribunal against him, from which he has appealed, on giving just and adequate security. * * * And in this case, *if there is no law entitling the party to a stay of proceedings in any event, on an order appointing a receiver of his property from which he has appealed, it would seem to be an omission entirely inconsistent with the general spirit of the provisions of the law on this subject; and, so regarding it, we should be inclined to allow a stay of proceedings, without inquiring into the case further than to determine what security, if any, should be given.*"

In Levy *vs.* Goldbery, 40 Wis. 308, it was said per Lyon, J. (p. 311):

"It was held in Hudson *vs.* Smith, 9 Wis., 122, that the power of this court to stay proceedings in any matter appealed to it, does not altogether depend upon statutory enactment, *but is inherent in the court.* * * * It seems to us that this motion is within the spirit of the rule. Although this appeal is not from the judgment in form, yet it is so in substance and effect. * * * *It is obvious that unless the motion be granted, the defendant is in danger of losing the benefit of his appeal, should it be determined in his favor.* * * *

"The circuit court undoubtedly had power to stay proceedings on the judgment, but that court refused to do so. The appeal having been perfected, this court will grant the same relief."

In City of Janesville *vs.* Janesville Water Co., 61 N. W., 770, the first syllabus reads as follows:

"The supreme court has power to stay the proceedings in a case before it during the pendency of the appeal."

Say the court, per Pinney, J.:

"*This court has the inherent power, by virtue of its appellate jurisdic-*

tion, to grant the order applied for, and to restore the parties, so
176 *far as may be, to their condition in respect to the matters affected by the order at the time it was granted.* This has been held in many cases, and in Northwestern Mut. Life Ins. Co. *v.* Park Hotel Co., 37 Wis., 131, the authority of the court to grant the relief sought by this motion is clearly and vigorously enforced. (This was an opinion by Justice Ryan, one of the greatest jurists the West ever produced.) To the same effect are the cases of Hudson *v.* Smith, 9 Wis., 122, and Levy *v.* Goldberg, 40 Wis., 308, and since then this power has been exercised in numerous unreported instances. Appeals from orders and judgments, in the cases allowed by law, *are a matter of right;* and within the limitation that the appeal is taken and prosecuted in good faith, and that the party asking it gives the reasonable security required for that purpose, *a stay of proceedings during the pendency of an appeal is quite of course, and really a matter of right, without which an appeal allowed by law would often prove fruitless, and the appellate jurisdiction of the court be found inadequate to the ends of justice and the proper protection of the rights of parties during the pendency of the appeal.*"

In Coleman *vs.* Phelps, 24 Hun, 320, an interlocutory judgment was entered, adjudging the deed given by the plaintiff to the defendant to have been procured by fraudulent misrepresentations and undue influence, and directing that it be given up and canceled, and also providing for a reference to take and state an account of the rents received from the premises and the payments made on account thereof. An appeal having been taken from the interlocutory judgment, an application was made for a stay of all further proceedings during the pendency thereof.

Held, that the stay should have been granted.

In this case, under a section of the code, the appeal in question did not operate as a stay without special order from the court, but we submit that the statute giving the court this power only confirmed a power inherent in every court of record to control the property and the actions of the parties over which it has jurisdiction.

177 In Smith, etc., *vs.* Western Un. Tel. Co., 83 Ky., 269, it was held that

"Where on final hearing an injunction has been dissolved, the execution of a supersedeas bond by the plaintiff and the service of an order of supersedeas leaves the injunction in full force, and the defendant is guilty of contempt if he disregards it."

It will be observed that this case gives full effect to the English doctrine that an appeal is itself a supersedeas, whereas the doctrine usually applied in America is to require an *additional* order.

The court say (p. 272):

"If one is about to tear down my home, or waste and destroy my property, so as to produce irreparable injury, an injunction having been obtained, *although subsequently dissolved, will remain in full force if the proceedings are stayed by a supersedeas.*"

Van Walkenburgh vs. Railway Bank, 8 N. J. Eq., 725, the first syllabus reads as follows:

"On appeal from an order of the chancellor dissolving an injunction, the court of appeals will usually make an order in the nature of a temporary injunction, retaining the parties and the subject matter in statu quo until the final hearing of the appeal, where the whole matter in controversy is the continuance of the injunction, as on a pure injunction bill, or where it appears that such an order is necessary to prevent great and irreparable mischief to the rights of the appellant."

In Williams vs. Hilton, 6 So. Rep., 472, a case arising in Florida, an appeal was taken from an order dissolving an injunction previously granted. The Chief Justice of the Supreme Court, on application of appellant, granted a supersedeas, and a motion was made to vacate the supersedeas. The holding of the court was summed up in the third syllabus as follows:

"3. On application for the supersedeas, in appeal from an interlocutory order or decree, the judge or justice is not re-
178 quired to satisfy his mind on litigated questions, but to see, from an inspection of the record, that there is an appeal; that it is not frivolous; and that the state of the case as to its future course is such as to render a stay of proceedings proper."

In Home Fire Ins. Co. vs. Dutcher, an unusually well-considered case in Nebraska, reported in 67 N. W., 706, the facts were that the Home Fire Insurance Company instituted an action in the district court of Douglas county to foreclose a mortgage executed by Warren Dutcher on premises which he afterwards conveyed to defendant A. J. Dutcher. There was a prayer for a receiver pendente lite. The district court sustained said application, and appointed a receiver for the premises. From this order the defendants appealed. A bond was given on appeal, and a motion was made to strike it from the files on the grounds: First, that there was no authority in law for superseding an order appointing a receiver pendente lite; and, second, that if such an order might be superseded, the bond should be conditioned to pay the reasonable rental value of the property, pending appeal. This motion the court sustained, and, an application having been made by the receiver for a writ of assistance, the appellants made application to the supreme court for an order restraining the district court and the receiver from taking any further steps pending the appeal.

The court say:

"The primary question presented is that stated as the first ground of the motion to strike the bond from the files, to wit, Is there any authority for superseding an order appointing a receiver pendente lite? * * * The question so presented is by no means free from difficulty. A supersedeas is now almost everywhere so much controlled by statute, and the statutes are so different in their provisions, that but little assistance can be had from the adjudications of other

States. After a severe struggle it became established in
179 England that an appeal of itself operated as a supersedeas. Following the analogy of this practice, it is held in some States that statutes providing special conditions, such as the giving of a bond, in order to affect a supersedeas, are merely restrictive in their character, and that the appeal itself works a supersedeas where there is no statute requiring a bond or a compliance with other conditions. A different doctrine has, however, been announced in this State; and it must be accepted as the established rule here that a supersedeas can be had, as a matter of right, only where it is affirmatively provided for by statute. * * * For several reasons we think that section 677 of the code should not be so construed as to authorize a supersedeas of an order appointing a receiver *pendente lite* as a matter of right. * * * The most conclusive reason, however, for the construction which we have indicated is that the appointment of a receiver is a provisional remedy. It does not adjudicate any rights. Its purpose is merely the protection of the property in dispute pending the action. Provisional orders are usually summary, frequently not subject to review, always largely discretionary, and almost universally not subject to be superseded. * * * As pointed out already, to allow a supersedeas as a matter of right would, in many cases, defeat the whole purpose of the order, and we think the obvious intention of the legislature was that such purpose should not be in that manner defeated, and for that reason no provision was made for superseding such an order. * * *

"In holding that a party may not, as a matter of right, supersede an order appointing a receiver, *we do not hold that a supersedeas may not be granted in the discretion of the court.* This court has already held that a writ of ouster in a *quo warranto* case and a writ of mandamus are writs which may not be superseded as a matter of right; but it has also held that the court may, in its discretion, allow a supersedeas in such cases" (citing cases). "It is quite clear from the record that the district court has been proceeding on the theory *that there was no authority whatever for a supersedeas in this case,* and has not exercised, or been called upon to exercise, its discretion in granting or refusing a supersedeas. This court now has jurisdiction of the case on appeal, *and we have no doubt of its power to itself grant a stay on proper conditions*" (citing City of Janesville *vs.* Janesville Water Co., 89 Wis., 159, 61 N. W., 770; Haught *vs.* Irwin, 166 Pa. St., 548, 31 Atl., 260).

180 "*Inasmuch as the allowing of a stay is wholly a matter of discretion, it follows that the court may, in allowing the stay, affix such conditions as in its judgment, are necessary for the protection of the parties.* A bond conditioned merely not to commit waste is, as we have seen, not a sufficient protection. We think the bond should be further conditioned to pay the reasonable rental value of the property to the receiver in case the order appointing him should be affirmed. * * * If a bond in that sum, and so conditioned, be filed within twenty days, with sureties approved by the clerk of the

district court, the enforcement of the order will be suspended pending appeal. If not so given, the order heretofore entered, staying proceedings, will stand discharged."

In Ferguson *vs.* Dent, 29 Fed., 1, it is said (p. 5):

"I doubt if a case can be found surrendering a possession, so taken, to the triumphant plaintiff, if the defendant appeals, and the court be unrestricted by some limitation on its powers in that regard. Has our statute abrogated all such equitable considerations, and required us here, without inquiry into other facts, to surrender possession because of this omission in the bond? I think not. * * * We are forced to acknowledge that those courts (courts of equity) have not been shorn of their ordinary power to stay proceedings pending an appeal, outside of and beyond this statute. * * * The appellate court may, beyond question, control the exercise of the power, but still it exists, and, in my judgment, the most important consideration to govern the discretion is that which demands that we save that control of the appellate court which it should always have over the *res* to make its jurisdiction effectual. Just as before the appeal, it was within the power of this court, why should not we do all we ought, to transfer the control to the appellate court? If it be equitable to commence the judicial custody, generally it would be equitable to continue it. * * *

"We allow no man to eject the receiver or to sue him, or to tear down the buildings (which power has been invoked in this case as against the city police) without our consent."

Further (p. 9):

"Being better informed, the court finds it has larger power
181 than it was aware of, and that its continued control does not depend at all upon whether a bond was given or not. I think it is not precluded by the final decree from exercising that larger power. * * * There is no reason why the court may not exercise it at any time, particularly since Goddard *v.* Ordway, 94 U. S., 672, decides that it is the duty of the court below, notwithstanding an appeal, to give the necessary orders to preserve the property in the hands of the receiver pending the appeal whenever it remains in its possession."

Respectfully submitted,

JOHN F. DILLON,
RUSH TAGGART,
R. V. LINDABURY,
HENRY D. ESTABROOK,
For Appellee.

182 The following is the form of decree proposed by the appellee, viz:

United States Circuit Court of Appeals for the Third Circuit,
—— Term, 1903.

THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, Appellants,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee.

This cause coming on to be further heard upon the motion to settle the form of order or decree to be entered upon the opinion heretofore entered herein by this court, and counsel for the respective parties having been heard, and this court being fully advised in the premises, it is

Ordered and decreed that the judgment and order of the circuit court of the United States for the district of New Jersey, awarding a preliminary injunction according to the prayer of the bill of complaint, be and the same hereby is reversed.

And it is further ordered and decreed that for want of equity appearing on the face of the bill of complaint filed herein, and for the reasons stated in the opinion of this court rendered and filed herein, the said circuit court be, and it hereby is, directed to dismiss the bill of complaint of the Western Union Telegraph Company for want of equity.

183 And it is further ordered that the said complainant pay the costs in this court and in the said circuit court of the United States for the district of New Jersey.

And thereupon comes complainant and prays an appeal from the foregoing order and decree to the Supreme Court of the United States, which appeal is allowed (and the bond on such appeal is hereby fixed at the sum of one thousand dollars ($1,000), to be approved by a justice of the Supreme Court of the United States).

And it is further ordered that the *status quo* and the present condition of the parties and property here involved be continued and maintained until a decision shall be made on this appeal by the Supreme Court of the United States, or until that court shall order to the contrary, provided, however, that said complainant shall without delay perfect said appeal and prosecute the same with diligence in the Supreme Court; and shall moreover within 20 days give a bond to the defendants conditioned that it will prosecute its appeal to effect and failing to make its plea good, shall also answer all damages and costs and that said bond shall be in the amount of — dollars, to be approved by one of the justices of this court or by a justice of the Supreme Court of the United States.

184 Ex. C.

(Copy of letter.)

The Pennsylvania Railroad Company, general office, Broad Street station.

Office of the general manager.

PHILADELPHIA, *June 13th*, 1903.

Mr. B. Brooks, general sup't Western Union Telegraph Company, New York, N. Y.

DEAR SIR: Confirming my telegram of even date, the space now occupied by the poles and wires of the Western Union Telegraph Company on the lines of railroad and property of the United New Jersey Railroad and Canal Company, and its controlled and affiliated companies in the State of New Jersey, is immediately required for necessary use by the Pennsylvania Railroad Company, its lessee, but, before removing same, I beg to refer to the offer of purchase made in President Cassatt's letter to your President Clowry of July 5th, 1902, and to renew the offer therein made to buy these poles and wires at a fair valuation and thus save your company the loss involved through their removal. Unless this offer be accepted before twelve o'clock noon on Monday, the fifteenth instant, it will be understood as declined.

Yours truly,

(Signed) W. W. ATTERBURY,
General Manager.

185 (*Telegram.*)

NEW YORK, *June* 15, 1903.

A. J. Cassatt, president Pennsylvania Railroad Company, Philadelphia, Pa.:

The offer of your company made through your general manager, Mr. Atterbury, to purchase the lines of telegraph, now owned and operated by this company involved in the New Jersey case and requiring answer by twelve o'clock noon on this date, with notice that unless your company's offer is accepted within that time your company will proceed to take forcible possession of such lines and remove the same from its right of way, was duly received, and has been considered as thoroughly as the time allowed has permitted, I have previously informed you that this property is an important and necessary part of the system of the Western Union Telegraph Company, and ordinarily that company would never think of selling it. Moreover, I am advised by counsel that it is doubtful if the law would permit it ordinarily to alienate property thus dedicated

190 UNITED STATES OF AMERICA, *ss:*

To The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to the allowance of an appeal, filed in the clerk's office of the United States circuit court of appeals for the third circuit, wherein The Western Union Telegraph Company is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant as in the said allowance of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. W. Peckham, associate justice of the Supreme Court of the United States, this seventeenth day of June, in the year of our Lord one thousand *eight* hundred and ninety-three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

I accept service of the foregoing citation on behalf of both appellees.

JOHN. G. JOHNSON.

June 30, 1903.

[Endorsed:] In the Supreme Court of the United States. W. U. Tel. Co., pl'ff in error, *v.* Penna. R. R. Co., def't in error. Citation on appeal. Original.

191 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to one hundred and ninety inclusive to contain a full, true, complete and faithful copy of the original transcript of record and proceedings in the case of The Western Union Telegraph Company, appellant, *vs.* The Pennsylvania Railroad Company and The United New Jersey Railroad & Canal Company, appellees, on file, and now remaining among the records of the said court, in my office.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixteenth day — July, in the year of our Lord one thousand nine hundred and

three, and of the Independence of the United States the one hundred and twenty-eighth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 19,018. U. S. circuit court of appeals, 3d circuit. Term No. 367. The Western Union Telegraph Company, appellant, *vs.* The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Co. Filed July 23d, 1903.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 90.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

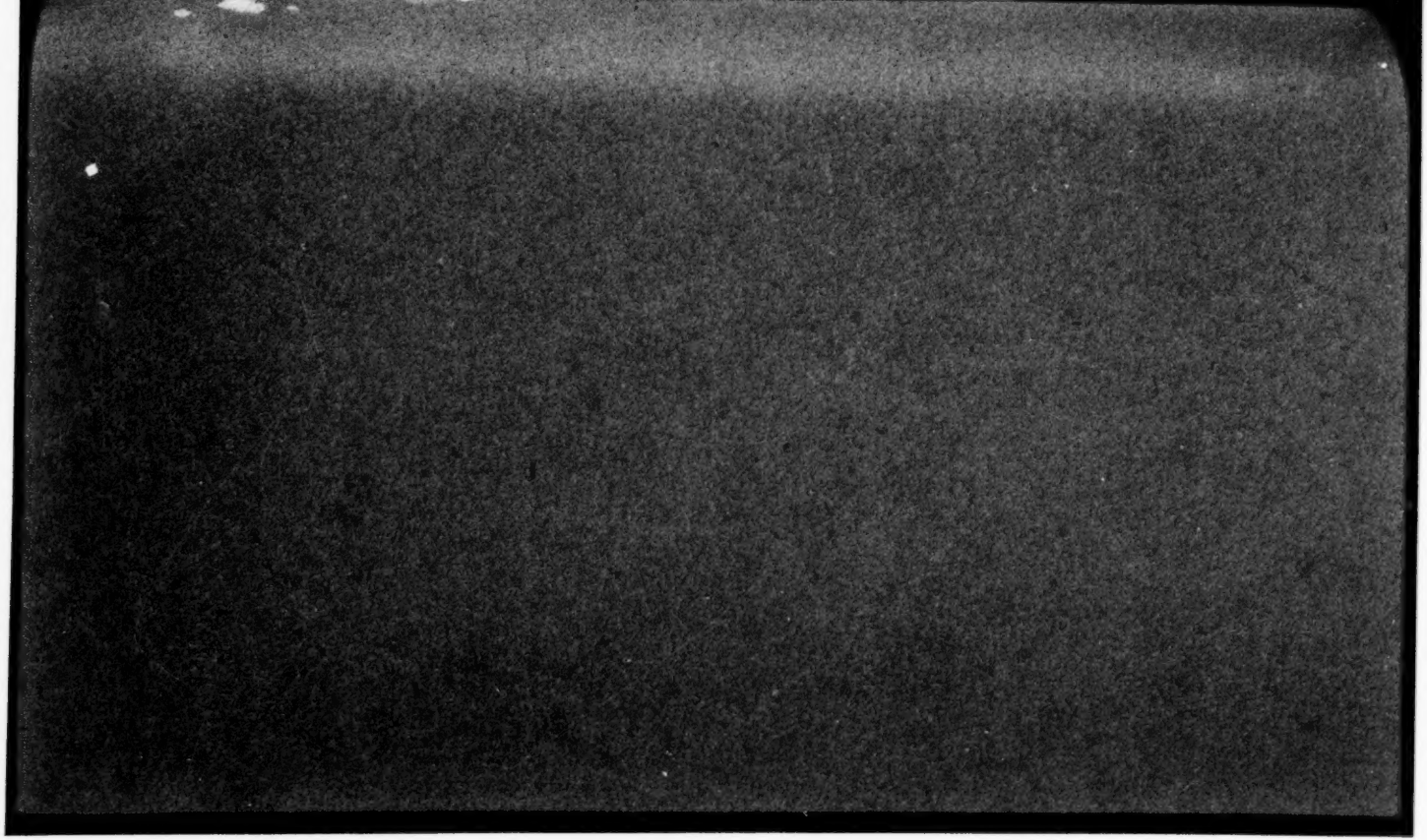
vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JULY 23, 1908.

(19,019.)



(19,019.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 368.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1903.

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1 In the United States Circuit Court of Appeals, Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Complainant in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania, Defendant in Error.
} No. —.

Among the rolls, records and judicial proceedings in the circuit court of the United States for the western district of Pennsylvania, at No. 18 May term, 1902, may be found the following words and figures, to-wit:

Docket Entries.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation Citizen of the State of New York,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation Citizen of the State of Pennsylvania.

2 Plaintiff's petition for the approval and filing of its bond tendered therewith in the sum of one hundred thousand dollars ($100,000.00) for the use and benefit of the defendant in its own behalf and as the owner, lessee and operator of the railroad over whose properties the rights of way sought to be appropriated by the plaintiff extend, and for the issuance of such process or for such proceeding as may be agreeable to principles and usages of law, filed January 15th, 1903. *Ex-parte* affidavit of Harry D. Easton attached and exhibits filed. 1902, November 20th, argument had on plaintiff's petition. C. A. V. 1903, January 15th, opinion filed granting order dismissing the petition to continue. See May term, 1903, equity. And now, January 20th, 1903, this case having come on for hearing our petition of the Western Union Telegraph Company for the approval and filing of its bond to the Pennsylvania Railroad Company, and for the issuance of process, and the same having been argued by counsel, after due consideration, it is now ordered that said petition be, and it is hereby dismissed, at the cost of the petitioner. By the court. Jos. Buffington, judge. 1903, January 22, the following entries in the argument list appear on the record by direction of the court: "On November 20th, 1902 the petitioner presented in open court its petition, and counsel for the Pennsylvania Railroad Company appearing specially objected to the court's receiving the petition for want of jurisdiction. The court declined to receive the petition and fixed November 20, 1902, for a

hearing. On November 26, 1902, the hearing so fixed was had in open court, counsel for the Pennsylvania Railroad Company appearing specially and denying the court's power to entertain or act in pursuance of said petition, and the case was thereupon fully argued on both sides." Said petition was dismissed as per above order of January 20th, 1903. 1903, January 26, petition for writ of error and allowance of same filed. 1903, January 26, assignments of error filed. 1903, January 26, bond approved and filed. 1903, January 26, citation issued. 1903, January 26, citation
3 served on Patterson, Sterrett & Atcheson, attorneys for Pennsylvania Railroad Company.

Plaintiff's Petition.

To the honorable the judges of the said court:

The Western Union Telegraph Company, by its attorney, comes and represents:

(1.) That it is a telegraph company, a corporation duly organized under the laws of the State of New York relating to telegraph companies and a citizen and resident of the State of New York, having its principal place of business in the southern district of said State, and is and for many years last past has been doing business within the State of New York, the State of Pennsylvania, and the other States and Territories of the United States, and within the Dominion of Canada, as a telegraph company.

(2.) That the defendant, The Pennsylvania Railroad Company is a corporation duly organized under the laws of the State of Pennsylvania and is a citizen and resident of the State of Pennsylvania.

(3.) That the matters in controversy in this suit exceed the value of two thousand dollars, exclusive of interests and costs and are wholly between citizens of different States and arise under the Constitution and laws of the United States and therein the Western Union Telegraph Company claims privileges and rights under acts of Congress and the Constitution and laws of the United States.

(4.) The Western Union Telegraph Company further says that it was organized as a telegraph company as aforesaid in the year 1851, and thereupon and thereafter began the work of the construction and operation of telegraph lines in the State of New York and elsewhere, and since said time has been continuously engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has extended its lines as a
4 continuous system into and through the State of Pennsylvania, and through all the States and Territories of the United States, and through the Dominion of Canada; and that its lines connect with ocean cables leading to Central and South American and foreign countries, through and over which system of lines it transmits upwards of 65,000,000 messages yearly for the public and for the Government of the United States, exclusively, of railroad

messages, messages relating to its own business, and messages transmitted over wires leased by it to private parties; that at the present time said system of telegraph lines under its operation and control, comprises over 192,000 miles of poles and cables and over 900,000 miles of wire; and its capital stock is distributed among over 11,000 stockholders. That the lines of telegraph in the system above described have been in operation for many years past and are relied upon by the public and by the Government of the United States and by the governments of foreign countries as a means of quick transmission of intelligence to and from all parts of the United States and to and from foreign countries.

(5.) That the legislature of the Commonwealth of Pennsylvania, by an act entitled "An act to incorporate the Atlantic & Ohio Telegraph Company," approved the 24th day of March, 1849, duly incorporated the Atlantic & Ohio Telegraph Company by that name and style, with authority, among other things, to make, use and maintain telegraph lines and communication by one or more routes between the cities of Philadelphia and Pittsburgh and intermediate places and from Pittsburgh to the Ohio State line; said act gave to the said Atlantic & Ohio Telegraph Company express power to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this State, the said works so to be placed as not to interfere with the common use of such roads, highways, streets and waters, and the said corporation, and all other persons by them authorized, appointed or employed shall (it was enacted) have power and authority to enter into and upon, hold, occupy and enjoy any lands for the purpose of locating and constructing said telegraph line and using, maintaining, repairing and enjoying the same upon which the same may be located or which may be necessary or convenient for the location of the same, provided that such compensation previous thereto shall be made, secured or tendered to the owner or owners of any land or lands as shall be agreed upon between the parties or in such manner as hereinafter mentioned; and the said act gave, in the event of a failure or inability to agree upon such compensation, the right to the said company to have ascertained the amount of compensation or damages to the owner of lands taken and used by said company for telegraph or other purposes on its telegraph line or lines. By an act of assembly of the Commonwealth of Pennsylvania entitled "An act reviving the charter of the Atlantic & Ohio Telegraph Company, approved twenty-fourth March, one thousand eight hundred and forty-nine," approved February 25th, 1869, the charter of the said Atlantic & Ohio Telegraph Company was made perpetual. Annexed hereto and made a part hereof are true copies of said acts marked "Exhibit 1."

(6.) That afterwards, to-wit, on or about the 15th day of April, 1864, the said Atlantic & Ohio Telegraph Company entered into a contract of lease with the Western Union Telegraph Company, whereby the Atlantic & Ohio Telegraph Company leased and demised to the Western Union Telegraph Company, for the term of

10 years, commencing on the first day of April, 1864, and continuing thereafter until terminated by six months' notice at the option of either party, all of the telegraph lines, instruments, property, offices and franchises of the said Atlantic & Ohio Telegraph Company for and in consideration of which lease said Western Union
Telegraph Company covenanted and agreed to pay, free from
6 taxes, in quarterly payments of 2½ per cent. each in April,
July, October and January in each and every year of the term of said lease, to the treasurer of the said lessor, at the rate of 10 per cent. on the par value of the stock in the said company, excepting the amount owned at the time of each payment by the said lessee; the lease contained a covenant on the part of the lessee to keep the said lines in repair and deliver them and their appurtenances over to the lessor at the expiration of the lease in good working order. Annexed hereto and made a part hereof is a true copy of said lease marked "Exhibit 2."

(7.) Afterwards, to-wit, on or about the 20th day of June, 1864, the said Atlantic & Ohio Telegraph Company made an agreement with the defendant herein, to-wit, The Pennsylvania Railroad Company, whereby the said railroad company granted to the said telegraph company, so far as the railroad company had the legal right to do so, permission to construct and maintain a line of telegraph wires along and adjacent to the line of railroad of the said Pennsylvania Railroad Company from Philadelphia to Pittsburgh, in the State of Pennsylvania, for the consideration in the said agreement set forth, which agreement was without limit as to term or duration. Said contract was afterwards, to-wit, on or about the 23d of June, 1864, assigned by the said Atlantic & Ohio Telegraph Company to the Western Union Telegraph Company, which said lease and contract were ratified and confirmed by the act of the legislature of the State of Pennsylvania, entitled "An act supplemental to an act entitled 'An act to incorporate the Atlantic & Ohio Telegraph Company, approved March 24, 1849, and to confirm certain agreements executed by said company," approved May 3d, one thousand eight hundred and seventy-one, the same as if the said lease and contract had been made by virtue of express authority of law. By said act of assembly
it was also provided that said Atlantic & Ohio Telegraph
7 Company should have and possess all the rights, powers and
privileges conferred by the third and fourth sections of the act of the legislature of Pennsylvania to incorporate the Eastern Telegraph Company, approved the 5th day of April, 1866. Annexed hereto and made part hereof is a true copy of said act marked "Exhibit 3."

By said third and fourth sections of said act to incorporate the Eastern Telegraph Company it was provided, *inter ailia*, that said company should have the power to purchase, make, use and maintain any connecting or side lines. Annexed hereto and made part hereof is a copy of said 3d and 4th sections of said act marked "Exhibit 4."

Under the said lease and contract ratified and confirmed by

the legislature of Pennsylvania, and the acts of the Atlantic & Ohio Telegraph Company and of the plaintiff, The Western Union Telegraph Company, thereunder, the plaintiff is advised and states that The Western Union Telegraph Company has the right and power to exercise all the corporate rights, powers, privileges and franchises of the said Atlantic & Ohio Telegraph Company, including the right to appropriate, on inability to agree with the owner, all lands necessary for the construction, maintenance and operation of the said lines of telegraph from Philadelphia to Pittsburgh with any and all such branches therefrom as it may think proper.

(8.) That the Congress of the United States duly passed an act, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes;" and that the Western Union Telegraph Company, on or about the 8th day of June, 1867, duly accepted the provisions of said act by filing with the Postmaster General of the United States in writing the acceptance by said company of all the restrictions and obligations of the said act of Congress, and thereby and thereafter
8 continuously became, and has been and still is entitled to all the privileges and rights granted by the said act of Congress to telegraph companies thus accepting the benefits, restrictions and obligations of said act and the said telegraph company has, at all times, complied with the provisions of said act, and has rendered to the various departments and officers of the Government of the United States all the duties and services required by said act, giving to the said Government of the United States priority over all other business, and at rates fixed by the Postmaster General, which rates, as thus fixed by him, have been very much lower than the reasonable rates charged for similar services rendered to the general public.

A duly exemplified copy of the plaintiff's said acceptance of the said act of July 24, 1866, is hereto attached as part of this petition, marked "Exhibit No. 5."

(9.) That by act of Congress, approved June 8, 1872, all railroads or parts of railroads which then were or thereafter might be in operation, were declared to be established post-roads, and by a further act of Congress, approved March 1, 1884, all public roads and highways, while kept up and maintained as such, were declared to be post-roads; and by the provisions of said act of Congress, approved July 24, 1866, there was granted to any telegraph company then organized, or which might thereafter be organized under the laws of any State, and which accepted in writing the provisions of said act, the right to construct, maintain and operate telegraph lines through and over any portion of the public domain and over and along any of the military or post-roads of the United States which then were or might thereafter be declared such by law, subject to the condition only that such lines of telegraph should be so constructed and maintained as not to obstruct the navigation of streams or waters over, under or across which the same should be

laid, or interfere with the ordinary travel on such military or post-road.

9 (10.) That the said acts of Congress apply to the railroads of the defendant herein mentioned and described, and the said railroads are post roads of the United States duly established by act of Congress in that behalf provided, and also public roads and highways under said acts of Congress and the laws and constitution of the State of Pennsylvania relating to said railroads, to which said Pennsylvania Railroad Company is subject. That the plaintiff, The Western Union Telegraph Company, having duly filed its written acceptance with the Postmaster General of the restrictions and obligations of the said act of July 24, 1866, and fully complied with all the requirements of said acts of Congress, above mentioned has the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendant herein mentioned and described so as not to interfere with the ordinary travel thereon, and the plaintiff is ready and willing to make to the defendant, a just compensation for such use by the plaintiff of the roadway or right of way of the defendant company for the plaintiff's telegraph lines over and along the said railroads of the defendant.

(11.) That the said grant by the United States in and by the aforesaid acts of Congress of the right to construct, operate and maintain the telegraph lines of the plaintiff on the railroads of the defendant was a grant made upon a full, valuable and continuing consideration paid and rendered by the plaintiff to the United States, which consideration was the agreement of the plaintiff evidenced by the plaintiff's written acceptance of the act of July 24, 1866, duly filed on June 8, 1867, with the Postmaster General of the restrictions and obligations of the said act, and the performance by the plaintiff — all of the duties and obligations created and required by said acts of Congress. That the plaintiff has since acceptance of said act performed all its obligations required by said acts and by law, and the

10 plaintiff has given, ever since the date of filing of said acceptance, and is still giving, to the United States, and the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of the plaintiff company, situated over and along the railroads of the defendant, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by the plaintiff for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered to the Government. The plaintiff has accepted, among others, the provisions of the said act of Congress of July 24, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said act of Congress. The plaintiff states that by reason of the premises, its acceptance of the said act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by the plaintiff of the provisions of the said acts of Congress the right

granted by the said act of July 24, 1866, to the plaintiff to construct, maintain and operate its lines of telegraph over and along the railroads of the said defendant became vested, and the said grant is in full force and effect, and the plaintiff avers that its right to construct, maintain and operate its said lines of telegraph over and along the railroads and right of way of the defendant company is complete, the plaintiff being under an obligation or liability only to make fair and reasonable compensation to the defendant for the use of the said right of way or railways of the defendant by the plaintiff in the manner and under the restrictions of the said acts of Congress.

(12.) That, the defendant, The Pennsylvania Railroad Company is the owner of and in possession, control and operation as owner of lines of railroad in the State of Pennsylvania, beginning at
11 points on the boundary between it, the said State of Pennsylvania and the State of New Jersey at Trenton, and thence extending through the State of Pennsylvania to points on the boundary line between it and the States of Delaware, Maryland, Ohio and New York, respectively; which said lines of railroad lie partly in the eastern district and partly in the middle district and partly in the western district of said State of Pennsylvania, and form a continuous whole, and are operated as such, the main line extending from Philadelphia to Pittsburgh, with branches and connecting lines therefrom, as follows:

1. From the city of Philadelphia in a northeasterly direction to a point in the centre of the Delaware river, opposite Trenton, in the State of New Jersey.

2. From the city of Harrisburg in a southwesterly direction through Bridgeport, Mechanicsburg, Carlisle, Shippensburgh, Chambersburgh and South Pennsylvania Junction to the Maryland State line.

3. From the city of Pittsburgh in a northeasterly direction to the town of Driftwood.

4. From Lewistown Junction in a northerly direction to the town of Lewistown.

5. From Tiago Station to Mantua, both in the city of Philadelphia.

6. From Columbia, through York, Hanover and Littletown to Maryland State line.

7. From Middletown through Columbia and Peach Bottom to Maryland State line.

8. From Bridgeport through York, Hanover Junction and New Freedom to the Maryland State line.

9. From Marysville through Milesburg, Sunbury, Williamsport and the town of Fasset to the New York State line.

10. From Tyrone through Vail, Milesburg and Lock Haven to Williamsport.

12 11. From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgeway, Jonesonburg, Rolfe, Kane, Sheffield, Warren and Corry to Erie.

12. From Altoona to Hollidaysburg.

13. From Cresson to Ebensburg.
14. From Blairsville Intersection through Freeport and Kiskiminitas Junction to Butler.
15. From Blairsville to Indiana.
16. From Butler Junction to Allegheny.
17. From Greensburg to Uniontown.
18. From Brownsville to Pittsburg.
19. From Red Bank to Oil City.
20. From Millersburg to Williamstown.

That all said railways are within the State of Pennsylvania, and within the jurisdiction of this court; that at many points said lines of railway are constructed and maintained over and along the public streets, roads and highways in cities and villages and over and along public highways in the country and within the limits of said streets, roads and highways.

That in and by the constitution and the general public laws of the State of Pennsylvania, the said several railroads of the said defendant hereinbefore described, were created and made, and now are public highways, and as such subject to occupation and use by telegraph companies under the provisions and conditions of the act of Congress of July 24, 1866, as herein fully set forth.

(13.) That for many years last past there has been maintained and operated over and along the right of way of the said railroads hereinbefore described a line of telegraph owned, maintained and operated by the Western Union Telegraph Company, or its predecessors in title or estate or right, which has thus been maintained and operated with the consent of the defendant, The Pennsylvania Railroad Company, or its predecessor in title, and which has been and is now so located, maintained and operated as not to
13 interfere with the ordinary operation and management of the said railways or the ordinary travel thereon; that the Western Union Telegraph Company is in possession and control of the said telegraph lines and the same have been and still are connected with its system of telegraph in other States, Territories and foreign countries and have been continuously operated by it as a means for the transmission of intelligence for the public and for the Government of the United States and over the same are daily sent many thousands of messages to and from its main office in the city of New York and to and from the various States and Territories of the United States and foreign countries; that the said telegraph lines have been thus maintained and operated by the Western Union Telegraph Company for the 20 years last past with the consent of the Pennsylvania Railroad Company.

(14.) That said Pennsylvania Railroad Company has recently, to-wit, May 15th, 1902, notified the Western Union Telegraph Company to remove its poles and wires, and has with drawn its consent to plaintiff to longer occupy its premises; that thereupon the said Western Union Telegraph Company duly made application to the said Pennsylvania Railroad Company to have ascertained and determined the amount of compensation to which said Pennsylvania

Railroad Company is or would be entitled for the continued maintenance and operation of the said lines of telegraph over and along the said railways of the defendant under and subject to the terms, conditions and restrictions of the said act of Congress of July 24, 1866, and subject to the laws and constitution of the State of Pennsylvania; but said railroad company refused and declined to treat with the Western Union Telegraph Company or to agree or attempt to agree upon the amount of compensation for the construction, maintenance and operation of said telegraph lines or any of them over and along the said railways; on the contrary
14 the said defendant railroad company denies that the said acts of Congress or the said acts of Pennsylvania, or the said lease of the Atlantic and Ohio Telegraph Company confer upon the Western Union Telegraph Company any right to construct, maintain or operate its telegraph lines over and along said railways.

The Western Union Telegraph Company further says that the said lines of telegraph can continue to be located, maintained and operated without interference with the ordinary travel on the said railroads, or the ordinary use, management and operation of the said railways, and that the plaintiff seeks to construct, maintain and operate its lines of telegraph along said lines of railway, under and subject to the conditions named in said act of Congress of July 24, 1866, that such lines of telegraph shall be so constructed and maintained and operated as not to interfere with the ordinary travel on the said railroads, and subject also to the condition that when in the future, the location, maintenance and operation of the said lines should be found to interfere with the ordinary travel upon and use of said railways, to make such reasonable changes in the location, maintenance and operation of said parts of said lines of telegraph as that the ordinary travel upon said railways should be and remain uninterfered with by such lines of telegraph, as provided in the said act of Congress of July 24, 1866.

(15.) The Western Union Telegraph Company further represents that it is necessary for the continued maintenance and operation of its said lines of telegraph, that it shall have and enjoy the right to set and maintain poles along the right of way of the said railway company at such point or points thereon as that they will not interfere with the ordinary travel upon and use of the said railways, and avers that as the said poles have been heretofore and now are located thereon, they will not so interfere together with the right to place and maintain cross arms and fixtures thereon and to
15 string wires; also, the right to maintain and operate the same, with the further right to cable crossings where the same lines cross navigable waters, in order to connect the lines of wire upon the said poles with other lines of wire belonging to the said telegraph company, upon the said railways, as the plaintiff's system is now constructed maintained and operated for the communication of intelligence to all parts of United States, and as the same may be required to be extended and increased to meet the increasing demand for facilities of communication between different

parts of the country as an agent of interstate commerce, and as a method of transmitting messages for the Government of the United States and for the several departments thereof; that the plaintiff has sought from the said Pennsylvania Railroad Company its consent to the continuance in the present location upon the said right of way of the poles, cables, wires and fixtures where the same do not now interfere with the ordinary travel upon and use of said railways, with the provision that the same should be subject to reasonable changes to meet the requirements of changes in the situation of the said railways from time to time, so that the telegraph lines should not at any time hereafter interfere with the ordinary travel upon and use of the said railways; that the said railroad company has refused to consent to the said location or to any location of the said poles, cables and wires and fixtures over and along the said railway, or to agree or attempt to agree upon the amount of compensation which the said telegraph company should pay to the defendant for the use of their said railroads by the plaintiff in order to construct, maintain and operate on said railroads a line of telegraph by the plaintiff as hereinbefore set forth.

(16.) That the Western Union Telegraph Company by proper corporate action of its board of directors duly had and in the exercise of the power in it vested by virtue of said lease from the Atlantic & Ohio Telegraph Company and the acts of assembly
16 of the Commonwealth of Pennsylvania ratifying and confirming the same and in the exercise of all and every other power enabling it in any wise to do so, duly located, a single line of telegraph poles and wires over, along and upon the right of way of the line of railroad, branches and connecting lines owned, possessed, controlled and operated by the said Pennsylvania Railroad Company hereinbefore set forth and described and appropriated so much of the right of way not in actual use for railroad purposes as is now occupied and used by the existing line of telegraph poles and wires of the Western Union Telegraph Company as the same are now erected and constructed thereon; and also so much of the said right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires thereon over and along the defendant's said railroad where the said telegraph company now has no existing line of poles of which said part of said right of way is and was declared by the said Western Union Telegraph Company to be necessary for the errection, construction and maintenance of said line of telegraph poles and wires, the same being so constructed, maintained and operated on or near the edge of said right of way of said defendant company as not to interfere with the common use or operation of said lines of railroad by said Pennsylvania Railroad Company and subject always to reasonable changes.

The Western Union Telegraph Company further says that by due corporate action by its board of directors and officers it located a right of way for the construction, maintenance and operation of tel-

egraph lines along the rights of way of the Pennsylvania Railroad Company and the right of way of the properties of the railroad companies owned, operated, leased and controlled by said Pennsylvania Railroad Company, as shown upon a map hereby attached and described in a schedule attached to said map, said map and schedule being marked "Exhibits 6 and 7," respectively,
17 and that after said location and appropriation had been made by the Western Union Telegraph Company on the 12th day of November, 1902, a duly authorized officer of the Western Union Telegraph Company met George V. Massey, the general solicitor of the Pennsylvania Railroad Company in the premises duly authorized, and attempted to agree with said Pennsylvania Railroad Company upon a price and compensation to be paid for the use and occupation of the easement, right use, privilege or right of way so appropriated by the Western Union Telegraph Company for the construction, maintenance and operation of its said telegraph lines.

That the Western Union Telegraph Company was unable to agree with the Pennsylvania Railroad Company upon the compensation to be paid for the privileges, easements and rights of way sought to be appropriated by the Western Union Telegraph Company over and along the properties of the Pennsylvania Railroad Company and its owned, operated, leased and controlled lines as aforesaid, and thereupon the Western Union Telegraph Company duly tendered to the defendant Pennsylvania Railroad Company a bond in the sum of one hundred thousand ($100,000) dollars with the American Surety Company of New York as surety thereon to secure to said Pennsylvania Railroad Company compensation for any damage or injury that might be done the said Pennsylvania Railroad Company or the properties of other railroad companies in its ownership, or controlled and operated by it, or in its possession as lessee, and said bond was refused by said Pennsylvania Railroad Company and copy thereof is now attached to this petition and marked "Exhibit 8."

The Western Union Telegraph Company attaches hereto a map (Exhibit 6) showing upon the same the location of cable crossings, of poles, the number of wires thereon, the location of wires upon the bridges of the said railroad company, and also the location of
18 the line of poles with reference to the tracks and structures of the said railways as now located and maintained thereon and the parts of said right of way of the said defendant company upon which the same has been located by the board of directors of the said Western Union Telegraph Company and which have by it been duly appropriated as aforesaid for the erection, construction, and maintenance thereon and upon which location the plaintiff seeks to maintain and operate the said telegraph lines under the provisions, restrictions, and conditions of said act of Congress of July 24, 1866, and of the constitution and laws of the Commonwealth of Pennsylvania, including the said act incorporating the Atlantic & Ohio Telegraph Company and for such use of the right of way of the said defendant company the plaintiff is ready and willing and has offered and hereby again offers to make compensa-

tion; that the aforesaid corporate action of the Western Union Telegraph Company has been duly ratified and approved by corporate action in that behalf by the said Atlantic & Ohio Telegraph Company.

(17.) The Western Union Telegraph Company further says that on or about the 2nd day of October, 1891, it duly caused a certificate to be signed by its president and its corporate seal to be attached thereto and filed in the office of the secretary of state of the State of Pennsylvania, in compliance with the provisions of an act of the legislature of the State of Pennsylvania, entitled "An act to prohibit foreign corporations doing business in Pennsylvania without having known places of business and authorized agents," approved April 22nd, 1874, and acts amendatory and supplementary thereto.

Wherefore, Western Union Telegraph Company prays that this court may approve said bond, being Exhibit 8, and order the same to be filed for the use and benefit of the Pennsylvania Railroad Company in its own behalf and as the owner, lessee and operator of the railroads over whose properties the rights of way sought
19 to be appropriated by the Western Union telegraph extend as aforesaid, and may proceed to issue such process or take such modes of proceeding as may be agreeable to the principles and usages of law, and as shall be necessary to make inquiry and assessment and determination of the amount of compensation to be paid by the said Western Union Telegraph Company for the use of the roadway and right of way of the defendant and its branches and connecting lines to construct, maintain and operate its said line of telegraph and branches over and along the said railways of the defendant, subject to the conditions and provisions named in the said act of Congress of July 24, 1866, and the said acts of assembly of the State of Pennsylvania; and that upon the payment into court or to the defendant herein, as this court may direct, of the amount of such compensation for the said rights and interests acquired thereby by the said Western Union Telegraph Company, possession be adjudged to the Western Union Telegraph Company by this court of the said use, rights and interests according to law, and that the title to the said rights and interests as against the defendant thereby vest in the said Western Union Telegraph Company for the purposes aforesaid; and for such other and further proceedings, order and judgment as may be proper in the premises.

The plaintiff has caused this statement to be signed by its president and its corporate seal attested by its secretary to be hereto affixed.

ROBERT C. CLOWRY, *President.*

Attest: A. R. PROWDER, *Secretary.*

RUSH TAGGART,
HENRY ESTABROOK,
A. M. NEEPER,
Attorneys for Western Union Telegraph Company.

20 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

Robert C. Clowry, being duly sworn, says he is president of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he has read the foregoing statement and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ROBERT C. CLOWRY.

Sworn to before me this 15th day of November, 1902.

CHARLOTTE A. VAN BRUNT,
[SEAL.] *Notary Public, Kings County, No. 4.*

Certificate filed in New York county.

EXHIBIT 1.

An act to incorporate the Atlantic & Ohio Telegraph Company, passed A. D. 1849.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That James K. Moorhead, William McKee, William Spering, Henry O'Reilly, Thomas Bakewell, Charles Avery, Alvah Strong, George Dawson and Morris S. Wickersham and their associates, and such other persons as may hereafter become stockholders in the company called the Atlantic & Ohio Telegraph Company, their successors and assigns, shall be and they are hereby made and constituted a body politic and corporate for the purpose of making, using and maintaining telegraph lines and communications by one or more routes between the cities of Philadelphia and Pittsburgh and intermediate places and from Pittsburgh to the Ohio State line by the name, style, and title of the "Atlantic and Ohio Tel-
21 egraph Company," and by the same name, style, and title shall have perpetual succession and all the privileges and immunities belonging to a corporation; may sue and be sued, plead and be impleaded, complain and defend in all courts of law and equity, of record or otherwise; may purchase, receive, have, hold and enjoy, to them, their successors and assigns, such lands, tenements, and heredi-ments, goods, chattels, and all estate, real, personal and mixed, of what kind and quality soever, as may be necessary for the purposes of the company, and the same from time to time may sell, convey, mortgage, grant, alien, dispose of; to make dividends of such portions of their profits as they deem proper, and

also may make and have a common seal, the same to alter and renew at pleasure, and also to ordain, establish and put in execution such by-laws or ordinances and regulations as shall appear necessary and convenient for the government of said corporation hereby created not being contrary to the Constitution and laws of the United States and this Commonwealth, and generally may do all and singular the matters and things which to them shall lawfully appertain to do for the well-being of the said corporation and the due management and ordering of the affairs and business of the same. Provided that nothing herein contained shall be so considered and construed as giving to the said corporation any banking privileges or franchises or any privileges or franchises but such as may be necessary or belong to the making, using, or maintaining the said telegraph lines and communications.

SECTION 2. That the capital stock of said corporation hereby created shall be three hundred thousand dollars and shall be divided into six thousand shares of fifty dollars each and the telegraph line now in use between the cities of Philadelphia and Pittsburg, with the instruments and fixtures thereto belonging, together with the interest in the patent now in use, or any other patent the proprietors may deem it expedient to apply to said line, shall be taken and
22 considered to be the capital of said corporation; the directors shall have power, for the purpose of erecting additional lines or putting on additional wires, to increase the capital stock to five hundred thousand dollars by increasing the number of shares to ten thousand. Certificates of stock shall be issued, signed by the president and secretary and sealed with the common seal of the corporation. Said stock may be transferred in person or by attorney under such regulations as may be prescribed by the laws of the company.

SECTION 3. That the annual meetings of stockholders shall be held on the third Thursday in July of each and every year hereafter, of which thirty days' notice shall be given; at which meeting nine directors shall be elected to manage the affairs of the company, to serve for one year or until their successors are chosen. The directors shall elect one of their number president, and such other officers, and appoint such agents as they may deem necessary, and fix the amount of the salaries attached to the several offices and shall exercise all powers pertaining to the making, maintaining, using and managing such telegraph lines and the affairs, interest, and business of the said corporation authorized by its by-laws. The persons named in the first section of this act shall serve as directors until the next annual election.

SECTION 4. That at every election for officers each share shall entitle the holder thereof to one vote to be given by ballot. Provided, that no one stockholder shall be entitled, on account of the stock held by him to cast more than one-fourth of the entire vote, to which all the shares, if held singly, would be entitled, and absent stockholders may vote by agents or proxies, producing written authorities.

Powers.

SECTION 5. That it shall and may be lawful for the said corporation hereby created to erect and construct works, offices, 23 fixtures, and structures along and across any of the roads, highways, streets, and waters within this State; the said works to be so placed as not to interfere with the common use of such roads, highways, streets and waters; and the said corporation and all other persons by them authorized, appointed or employed, shall have power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing said telegraph lines and using, repairing, maintaining and improving the same upon which the same may be located, or which may be necessary or convenient for the location of the same: *Provided*, That such compensation previous thereto shall be made, secured or tendered to the owner or owners of any land as shall be agreed upon between the parties, or in such manner as is hereinafter mentioned.

Damages.

SECTION 6. That if the said corporation and the owner or owners of any lands through which the said telegraph lines shall pass cannot agree upon the prices or compensation to be paid by the said corporation for such lands taken or used or the damages done thereto, it shall and may be lawful for either party to apply to the court of common pleas for the county in which such lands shall lie, by petition, stating the facts in relation thereto; and thereupon it shall be the duty of the said court to appoint five disinterested persons of the proper county or of any adjoining county, and to fix a time, not less than twenty nor more than thirty days thereafter, for the said viewers to meet upon the premises where the damages are alleged to be sustained, of which time and place ten days' notice shall be given by the party petitioning to said viewers and to the other party; and the said viewers when so met shall first be sworn or affirmed justly and equitably to assess the damages, if any, which may have been or are likely to be sustained by the owner or owners of such lands and shall then view the premises and justly and equitably assess and estimate the damages which may have been or are likely to 24 be sustained by the owner or owners of such land through which the said telegraph lines shall pass, and deducting from the damages the value of the advantages and benefits which may have accrued or are likely to accrue to the owners of said land from the said telegraph lines or works connected therewith, and to make out a report of their assessment of damages, signed by the said viewers, and return the same to the court appointing them at the next term thereof, which report being confirmed by said court shall be considered a judgment of said court and collected in like manner as other judgments of the same court are collected, with the costs of court: *Provided*, That if the proper officer of said company, at any time before application made by either party for the appointment of viewers in manner hereinbefore directed, shall tender to the owner or owners of said land a sum of money in full compensation for the said damages, said company shall not be liable for costs in any subsequent proceeding, unless such owner of land shall receive a

larger sum than the previous tender of said company Provided, however, that the said judgment shall be subject to reversal upon appeal or by writ of error taken by either party, as other judgments in the said court are liable.

SECTION 7. That if any person or persons shall willfully or knowingly break, injure or destroy or interrupt the telegraph lines and communications, or any part thereof, or any work, erection, edifice, structure or device, or any part thereof erected by said company or to be erected by them in pursuance of this act, he or they shall pay the said corporation one hundred dollars for said offense, and shall be further liable for all damages which the said corporation may suffer in repairing the injury and from the interruption of their business, to be recovered in an action of trespass; and if any person incurring the penalty aforesaid shall, through insolvency or other causes, be unable or fail to pay
25 the penalty or damages aforesaid, and shall a second time commit trespass upon the said lines or any part thereof as aforesaid, he, she or they shall be liable upon conviction thereof to an imprisonment in the county jail of not less than one month nor more than six months.

SECTION 8. That dividends of so much of the profits of the company as shall be deemed expedient shall be declared quarterly in the months of January, April, July and October in each year. Provided that said company and all other telegraph companies heretofore chartered by the legislature of this Commonwealth and those which shall hereafter be chartered, shall pay to the State treasurer for the use of this Commonwealth, a tax upon their dividends as follows, viz., upon all dividends amounting to and exceeding eight per centum and not exceeding ten per centum, a tax of ten per centum; upon dividends amounting to and exceeding ten per centum and not exceeding twelve per centum, a tax of twelve per centum; and upon all dividends amounting to and exceeding twelve per centum, a tax of twenty per centum. Provided, that no dividend shall be declared which shall impair the capital stock of said company.

SECTION 9. That it shall be lawful for the company incorporated by this act to form a union with any company or companies now incorporated, or that may be hereafter incorporated by the States of Ohio, Kentucky, Indiana, Illinois and Missouri or any of them, for the purpose of constructing, using or maintaining a telegraph line or lines connecting Cincinnati, Louisville and St. Louis with Pittsburg, so that the stock of the said companies may constitute a common stock, upon such terms and conditions as the said companies respectively shall agree upon, and that as soon as such union shall have been effected, and a true copy of the agreement made for that purpose duly certified under the corporate seal of said companies shall have been filed in the office of the secretary of this Commonwealth, the stockholders of the said companies shall become
26 one body corporate and politic under the name and style of the "Philadelphia and St. Louis Telegraph Company," with

all the privileges incident to a corporation, and with all the rights, powers and privileges which by virtue of this act are vested in the company hereby incorporated.

SECTION 10. It shall be the duty of the president and secretary of every telegraph company, incorporated or otherwise, within the Commonwealth of Pennsylvania, to make an annual statement under oath or affirmation to the auditor general of the affairs and condition of every such company, setting forth the amount of the capital stock paid in, the amount of receipts and expenditures, and the amount of the dividends *are* declared for the then current year, such statement to be made and returned in the month of November in each and every year; and if said president and secretary shall neglect or refuse to make and return to the auditor general such annual statement, a tax of five per cent. shall then and in that case be levied on the capital stock to be collected in the same manner as is provided for the collection of debts due the Commonwealth.

SECTION 11. This charter shall continue in force for the period of twenty years and no longer unless renewed by the legislature; and the legislature hereby reserves the right to alter, amend or annul this charter whenever its privileges may be abused or whenever its provisions may be found injurious to the citizens of this Commonwealth.

(Signed) WILLIAM F. PACKER,
Speaker of the House of Representatives.

(Signed) GEORGE DARSIE,
Speaker of the Senate.

Approved the twenty-fourth day of March, one thousand eight hundred and forty-nine.

(Signed) WILLIAM F. JOHNSTON.

27 SECRETARY'S OFFICE.

PENNSYLVANIA, *ss:*

I do certify that the above and foregoing is a true and correct copy of the original act entitled "An act to incorporate the Atlantic and Ohio Telegraph Company" as the same remains on file in this office.

In testimony whereof I have hereunto set my hand and seal and caused to be affixed the seal of the secretary's office at Harrisburg, the sixteenth day of April, anno Domini, one thousand eight hundred and forty-nine.

(Signed) A. L. RUSSELL,
Deputy Secretary of the Commonwealth.

An act reviving the charter of the Atlantic & Ohio Telegraph Company, approved twenty-fourth March, one thousand eight hundred and forty-nine.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly

met, and it is hereby enacted by the authority of the same That the charter of the Atlantic & Ohio Telegraph Company entitled "An act to incorporate the Atlantic & Ohio Telegraph Company," approved twenty-fourth March one thousand eight hundred and forty nine be and the same is hereby extended and renewed without limit of duration, and the said corporation shall have perpetual succession. Provided: That said corporation shall pay into the treasury of the Commonwealth such bonus and taxes as are now or may hereafter be required by law.

(Signed) JOHN CLARK,
Speaker of the House of Reps.

(Signed) WILMER WORTHINGTON,
Speaker of the Senate.

Approved the twenty-fifth day of February, anno. Domini, one thousand eight hundred and sixty-nine.

(Signed) JOHN W. GEARY.

28 Office of the secretary of the Commonwealth.

HARRISBURG, *Feb. 25th, A. D.* 1869.

PENNSYLVANIA, *ss:*

I do hereby certify that the foregoing and annexed is a full, true, and correct copy of the original act of the General Assembly entitled "An act reviving the charter of the Atlantic & Ohio Telegraph Company," approved twenty-fourth March one thousand eight hundred and forty-nine, as the same remains on file at this office.

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year first above written.

(Signed) ISAAC B. GASH,
Deputy Secretary of the Commonwealth.

EXHIBIT 2.

This article of agreement, made the fifteenth day of April, A. D. 1864, between the Atlantic & Ohio Telegraph Company, of the first part, and the Western Union Telegraph Company, of the second part, witnesseth:

That for and in consideration of the covenants hereinafter mentioned, the said party of the first part, in pursuance of resolution of their board of directors authorizing and directing the same, does hereby lease to the party of the second part for the term of ten years, commencing on the first day of April, A. D., 1864, and continue thereafter until terminated by six months' notice, at the option of either party, all their telegraph lines, instruments, property, offices and franchises, with the right to work said lines at the expense of

the party of the second part, and enjoy the profits of the same as fully and effectually as heretofore done by the party of the first part, and the party of the second part agreeing to assume all the present indebtedness, liabilities, contracts and obligations of the first part.

29 And in consideration of the aforesaid lease, the said party of the second part does hereby covenant and agree to pay, free from taxes, in quarterly payments of two and a half per cent. each, in April, July, October, and January in each and every year of term, to the treasurer of the party of the first part, at the rate of ten per cent. on the par value of the stock in said company, excepting the amount owned at the time of each payment by the said lessee, party of the second part, the stock being fifty dollars per share.

The party of the second part also agree to keep said lines in repair, and deliver them and all their appurtenances covered by this agreement over to the party of the first part, at the expiration of this lease, in as good working order as they now are.

It is also understood and agreed between the parties hereto, that the party of the first part shall have the privilege of making the usual quarterly dividend of two dollars per share during the present month.

It is also understood that the lessees assume the payment of the salaries of the officers of the first party from the first day of April, A. D. 1864, the same being one thousand three hundred and thirty-three $\frac{33}{100}$ dollars, including the salary of the superintendent.

In witness whereof the president and secretary of the Atlantic and Ohio Telegraph Company, and J. H. Wade, a committee appointed to negotiate and conclude agreement on behalf of the Western Union Telegraph Company, by resolution of said company, dated April 4th, A. D. 1864, have hereunto set their hands and seals.

J. H. BERRYHILL, [L. S.]
President A. & O. Tel. Co.

H. H. SHILLINGFORD, [L. S.]
Secretary A. & O. Tel. Co.

J. H. WADE, [L. S.]
For the Western Union Tel. Co.

30 EXHIBIT 3.

An act supplementary to an act entitled "An act to incorporate the Atlantic & Ohio Telegraph Company," approved March twenty-fourth, one thousand eight hundred and forty-nine, and to confirm certain agreements executed by said company.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same, That the

Atlantic & Ohio Telegraph Company shall be entitled to all the privileges of the third and fourth sections of an act to incorporate the Eastern Telegraph Company, approved fifth of April, one thousand eight hundred and sixty-six, and that any agreement or lease heretofore at any time made by said company to or with any other persons or corporations having telegraph lines within or out of this State are hereby ratified and confirmed, the same as if they had been made by virtue of express authority of law.

(Signed) JAMES WEBB,
Speaker of the House of Representatives.

(Signed) WILLIAM A. WALLACE,
Speaker of the Senate.

Approved the third day of May, anno Domini one thousand eight hundred and seventy-one.

(Signed) JOHN W. GEARY.

Exhibit 4.

Sections 3 and 4 of an act to incorporate the Eastern Telegraph Company, April 5th, 1866 (in volume of 1868), referred to in the foregoing acts.

Section 3. That the said corporation shall have power to connect, by contract, with other persons or corporations having other telegraphic lines within or out of this State, for the purpose aforesaid; and it may also form a union with or lease to other 31 corporations, associations or individuals, incorporated by this Commonwealth or any other State, its own lines, with their fixtures and apparatus, or lease from any individuals, associations or corporations incorporated by this Commonwealth or any other State, their lines, fixtures and apparatus, and when such unions as aforesaid are formed, the stock may form a common stock upon such terms and conditions as the said companies or associations respectively shall agree upon, and that as soon as such union shall be effected and a true copy of the agreement made for that purpose, duly certified under the corporate seal of the said companies, shall have been filed in the office of the secretary of the Commonwealth, the stockholders of the said companies shall become one body, corporate and politic, under such name and style as they shall adopt and agree upon and embody in their certificate, with all the rights and privileges incident to a corporation and with all the rights, powers and privileges which, by virtue of this act, are vested in the company hereby incorporated.

Section 4. That the said corporation shall have power to purchase, make, use and maintain any connecting or side lines.

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EXHIBIT No. 5.

POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *February* 17, 1899.

(Ten cent revenue stamp.)

I, Perry S. Heath, acting Post-master-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

In testimony whereof, I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the city of Washington the day and year above written.

PERRY S. HEATH,
Acting Postmaster-General.

[SEAL.] B. W. T.

32 Annexed to the foregoing is the following, to wit:

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway, New York.

JUNE 5TH, 1867.

Resolved, That this company does hereby accept the provisions of the act of Congress entitled "An act to aid the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the secretary be, and is hereby authorized and directed to file this resolution with the Postmaster-General of the United States, duly attested by the signature of the acting president of the company and the seal of the corporation, in compliance with the fourth section of said act of Congress.

Adopted unanimously.

[Seal Western Union Telegraph Co.]

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Sec'y W. U. Tel. Co.
JOS. H. BLACKFAN,
Chief Clerk.

Filed June 8th, 1867.

EXHIBIT 6.

(Map.)

(Here follows map marked p. 33.)

34 "EXHIBIT 7."

Schedule attached to map of lines of Pennsylvania Railroad Company, showing the rights of way to be appropriated by the Western Union Telegraph Company and the purposes to which the same are to be devoted.

Location.	Purpose.
No. 1. Main line from Philadelphia to Pittsburg, via Harrisburg.	1. Right of way for existing pole lines of Western Union Telegraph Co., with wires thereon.
No. 2. From the city of Philadelphia, in a northwesterly direction, to a point in the centre of the Delaware river, opposite Trenton, in the State of New Jersey.	2. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 3. From the city of Harrisburg, in a southwesterly direction, through Bridgeport, Mechanicsburg, Carlisle, Shippensburg, Chambersburg, and South Pennsylvania Junction to the Maryland State line.	3. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 4. From the city of Pittsburg, in a northeasterly direction, to the town of Driftwood.	4. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 5. From the town of Lewistown Junction, in a northwesterly direction, to the town of Lewistown, thence to Logan.	5. Right of way for line of poles to support existing wires of Western Union Telegraph Co.
35 No. 6 From Tioga Station to Mantua.	6. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 7. From Columbia, through York, Hanover, Littlestown, to Maryland State line.	7. Right of way for new pole lines from Columbia to Hanover, to support Western Union Telegraph Company's wires; and right of way for the retention of existing pole lines of Western Union Telegraph Company, with wires thereon, from Hanover to Littlestown and from Littlestown to State line.

No. 8. From Middletown, through Columbia and Peach Bottom to Maryland State line.

8. Right of way for erection of new line of poles to support existing wires of Western Union Telegraph Company.

No. 9. From Bridgeport, through York, Hanover Junction and New Freedom to the Maryland State line.

9. Right of way for erection of new line of poles to support existing wires of the Western Union Telegraph Company.

No. 10. From Marysville through Millersburg to Sunbury; from Williamsport Junction, through Fassett to the New York State line.

10. Right of way from Marysville, through Millersburg to Sunbury, for erection of new line of poles to support existing wires of the Western Union Telegraph Company; from Sunbury to Williamsport Junction for existing line of poles and wires thereon; from Williamsport Junction, through Fassett, to the New York State line, for erection of new poles for existing wires of Western Union Telegraph Company.

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No. 11. From Tyrone through Vail, Milesburg to Williamsport.

11. Right of way from Tyrone to Lockhaven for new line of poles to support existing wires of Western Union Telegraph Company; right of way for retention of existing line of poles of Western Union Telegraph Company, with wires thereon from Lockhaven to Williamsport.

No. 12. From Lockhaven, through Renovo, Keating, Driftwood, Emporium, Ridgway, Johnsonburg, Rolfe, Kane, Sheffield, Warren and Corry to Erie.

12. Right of way for location of new lines of poles to support existing wires, of Western Union Telegraph Company.

No. 13. From Altoona to Hollidaysburg.

13. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

No. 14. From Cresson to Ebensburgh.

14. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

No. 15. From Blairsville intersection, through Freeport and Kiskiminetas Junction to Butler.

15. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

No. 16. From Blairsville to Indiana.

16. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

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No. 17. From Butler Junction to Allegheny.	17. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.
No. 18. From Greensburg to Uniontown.	18. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.
No. 19. From Brownsville to Pittsburg.	19. Right of way for erection of new line of poles to support existing wires of Western Union Telegraph Company.
No. 20. From Red Bank to Oil City.	20. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.
No. 21. From Millersburg to Williamstown.	21. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

Exhibit 8.

Know all men by these presents, that the Western Union Telegraph Company, principal, and the American Surety Company, surety, both said companies being corporations existing under and by virtue of the laws of the State of New York (hereinafter called obligors), are held and firmly bound unto the Pennsylvania Railroad Company, a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania (hereinafter called obligee), in the sum of one hundred thousand dollars, ($100,000) to be paid said obligee, its certain attorney, successors, and assigns, to
38 which payment well and truly to be made, said obligors bind themselves, and each of them, their respective successors and assigns, jointly and severally, firmly by these presents.

Witness the respective common and corporate seals of the said obligors, duly affixed hereto and attested by the signatures of their respective — presidents and secretaries, or attorneys, this 1st day of October, in the year of our Lord, one thousand nine hundred and two.

Whereas, said The Western Union Telegraph Company, obligor above named, has been and is now operating lines of telegraph for public use, by and with the consent of the said obligee, and other railroad corporations owned, leased, or operated by said obligee, upon and along the rights of way and properties of said obligee, and the railroad corporation aforesaid, and is desirous of continuing to maintain and operate said lines of telegraph upon and along said rights of way and properties, to the end that said lines of telegraph may be maintained and operated by said obligator perpetually upon

and subject to the conditions and regulations that may be imposed upon said obligator in the use and occupation of said properties and rights of way, as may be imposed according to law, but otherwise to be free from the control of said obligee, and

Whereas, pursuant to said corporate rights and franchises vested in said principal obligor by law, it has, by due corporate action, located certain lines of telegraph and the necessary space for their maintenance and operation along and upon the rights of way and properties of said obligor and the railroad corporation owned, leased, controlled or operated as aforesaid, as specified and described in and by "Schedule A" attached hereto, and shown upon the map forming part thereof, both said schedule and said map being specifically made part hereof.

Now the condition of this obligation is such, that if said obligators, or either of them, shall pay or cause to be paid to said
39 obligee such damages accruing by reason of the entry upon, use, occupation and appropriation of the right to construct, maintain and operate said lines of telegraph, together with the necessary space and land for their construction, maintenance and operation as may be agreed upon by said principal obligor and said obligee, or as may be awarded in proceedings to ascertain said proceedings according to law, then this obligation to be void, other- to be and remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By ROBERT C. CLOWRY, *President.*

Attest: A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKLES, *Vice President.*
CORTLANDT S. VAN RENSSELAER,
[L. S.] *Attorney.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 1st day of October, 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do
40 not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further stated that

he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

E. J. PERCEY,
[L. S.] *Notary Public, Kings County.*

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1892, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, ss:

I, Cortland S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of
41 said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Witness my hand and the seal of the company at the city of New York, this 1st day of October, 1892.

CORTLANT S. VAN RENSSELAER,
[L. S.] *Attorney.*

Affidavit of Henry D. Estabrook.

STATE OF NEW YORK, }
City and County of New York, } ss:

Henry D. Estabrook, being first duly sworn, says that he is solicitor for the Western Union Telegraph Company with headquarters at New York city.

Affiant further says:

That on the 12th day of November, 1892, he went to the city of

Philadelphia for the purpose of serving written notice on the Pennsylvania Railroad, that the Western Union Telegraph Company, through its board of directors, and the Atlantic & Ohio Telegraph Company, through its board of directors, took the corporate action respecting the construction, maintenance and operation of lines of telegraph along the lines of railway owned, controlled or operated by the Pennsylvania Railroad Company, and further to request the Pennsylvania Railroad Company to name a price for the rights and privileges which the Western Union Telegraph Company desires for its and for the Atlantic & Ohio Telegraph line operated by it as specified and defined in Exhibits "B" and "B" attached to said notice.

Affiant further says that, assuming that the Pennsylvania Railroad Company would refuse to negotiate with the Western Union Telegraph Company and the Atlantic & Ohio Telegraph Company as to the amount to be paid by said telegraph company or either of them for the privileges sought to be acquired by said telegraph companies, there had been prepared and executed, prior to the bringing the city of New York, for the city of Philadelphia, a bond
87 in the sum of $500,000, by the Western Union Telegraph Company, as principal, and the American Surety Company, of New York, as surety, which bond it was the purpose of affiant to tender to said Pennsylvania Railroad Company in the event it should refuse to negotiate as requested.

Affiant further says that a notice had also been prepared to advance, to the effect that the Western Union Telegraph Company would present the bond tendered to the Pennsylvania Railroad Company to the circuit court of the United States at Pittsburg, State of Pennsylvania, for its approval. The time of said presentation being left blank in said notice and the notice not served.

Affiant further says that it was the purpose to serve said notice upon the president of the Pennsylvania Railroad Company, if some one acting for him, but that, as a matter of courtesy to acquaint access to the president of said Pennsylvania Railroad Company through the legal department of said railroad company.

Affiant further says that he was told by Mr. Price, of the legal department of the said railroad company, that owing to pressing engagements affiant could not, at the time, have access either to the general solicitor of said railroad company or to the president thereof, but that if affiant would call at the following day, to wit: November 13th, at the hour of 10:30 a. m. the affiant would be admitted to an interview with the general solicitor of the railroad company.

Affiant was requested by Mr. Price to leave with him copies of the various papers above referred to, with the understanding that such papers were accepted for examination, and a request for interview for the following day, but was not to be considered as having been served in fact, to which affiant consented.

Accordingly, on the following day, November the 13th, 1902, a

10:30 o'clock a. m., affiant called at the legal department of
43 the said railroad company and had an interview with the general solicitor of said company, Mr. George V. Massey; and affiant says that said general solicitor had before him the various papers left by the affiant the day before; and that professing to act for and on behalf of the said Pennsylvania Railroad Company, the said George V. Massey refused to negotiate as to the amount of compensation to be paid by the Western Union or the Atlantic & Ohio Telegraph Companies for the privileges requested, and refused to accept the bond tendered by this affiant. And affiant says that the said George V. Massey first read and then delivered to this affiant a written statement, which is hereto attached, marked Exhibit "I" and made a part of this affidavit.

Affiant further says that thereupon he notified in writing the said Massey, that the bond in question would be tendered to the circuit court of the United States, at Pittsburg, State of Pennsylvania, on the — day of —— 1902.

Affiant further says that he particularly requested the said George V. Massey, general solicitor, as aforesaid, to either himself note in writing on each of said documents and notices, the fact that it was served upon his company, or that he have the president of his company do so, but said Massey declined so to do.

Affiant further says that copies of the aforesaid documents and notices so served upon the Pennsylvania Railroad Company by the affiant on the said 13th day of November, 1902, concerning the corporate action of said Western Union Telegraph Company and said Atlantic & Ohio Telegraph Company, the bond and the notice of application to the court for its approval, are hereto attached, marked Exhibits 2, 3 and 4, respectively, and made part of this affidavit,

Further, affiant saith not.

HENRY D. ESTABROOK.

44 Subscribed in my presence and sworn to before me this 14th day of November, 1902.

CHARLOTTE A. VAN BRUNT,
Notary Public, Kings County.

Certificate filed in New York county, No. 4.

EXHIBIT 1.

To the Western Union Telegraph Company:

Your written application, dated November 11th, 1902, this day submitted to the Pennsylvania Railroad Company, referring to certain action of the board of directors of your company, and of the Atlantic and Ohio Telegraph Company, respecting the location, construction, maintenance and operation of lines of telegraph along

the lines of railway owned, controlled or operated by the Pennsylvania Railroad Company, as set forth in the copies thereto annexed, marked with the letters "A" and "B," and requesting the Pennsylvania Railroad Company to name a price for the rights and privileges which you desire in connection therewith, is hereby respectfully answered as follows:

1. Some of the lines of railway whereon by said pretended action you have undertaken to locate a telegraph line are neither owned by, nor leased to, the Pennsylvania Railroad Company; and, although others of said lines of railway are operated by said railroad company under lease or otherwise, they are not owned by the latter.

2. The Pennsylvania Railroad Company requires and needs for its proper corporate purposes, and has in actual use accordingly, the whole of the right of way of its railroad. Any location of a telegraph line upon said right of way, or attempted appropriation of any portion thereof by your company, will seriously interfere with and impede the use and occupation of said right of way for the necessary and proper corporate purposes of said railroad company; and said railroad company will not permit any such location upon its right of way by your company, but—expressly denying that either your company or the Atlantic and Ohio Telegraph Company are possessed of any such rights or powers in this behalf as you pretend to assert—will, by all proper and lawful means, challenge and contest the same, and resist any attempted exercise thereof, or attempted location or appropriation of any portion of said railroad company's right of way for or in connection therewith.

3. The Pennsylvania Railroad Company insists that neither your company nor said Atlantic and Ohio Telegraph Company are possessed of, or invested with, any lawful right or power, in any capacity whatsoever, either to make your said pretended location on the right of way or property of said railroad company, or any part thereof, or adversely to enter upon or appropriate to your uses any portion thereof, and that said railroad company will accordingly resist any and all attempts of your company or said Atlantic and Ohio Telegraph Company, accordingly.

4. The Pennsylvania Railroad Company refuses to name any price for the rights and privileges desired by your application, and also refuses, and will continue to refuse, any and all offers or propositions by your company, either in its own behalf or as alleged operator of said Atlantic and Ohio Telegraph Company, for the acquisition by purchase or otherwise of said rights and privileges your application seeks to obtain upon the right of way and property of the railroad company.

5. The Pennsylvania Railroad Company refuses to accept any bond which you tender, or may hereafter tender, in connection with any pretended taking or appropriation of any portion of its right of way or property, which may at any time be attempted by you under any of the powers you pretend to possess and assert, the said rail-

road company hereby challenging and denying that either
46 your company or said Atlantic and Ohio Company can lawfully exercise the said pretended powers.

THE PENNSYLVANIA RAILROAD COMPANY,
By R. MILTON SPEER, *General Solicitor.*

Dated November 13, 1902.

EXHIBIT 2.

To the Pennsylvania Railroad Company:

The Western Union Telegraph Company respectfully represents that the board of directors of the Western Union Telegraph Company and of the Atlantic & Ohio Telegraph Company took due corporate action respecting the construction, maintenance, and operation of lines of telegraph along the lines of railway owned, controlled, or operated by the Pennsylvania Railroad Company, copies of which are hereto annexed marked "A" and "B."

The Western Union Telegraph Company respectfully requests the Pennsylvania Railroad Company to name a price for the rights and privileges which the Western Union Telegraph Company desires for itself and as the operator of the Atlantic & Ohio Telegraph lines, as specified and defined in Exhibits "A" and "B" attached hereto.

Dated ——, 1900.

Respectfully,

THE WESTERN UNION TELEGRAPH COMPANY,
By R. C. CLOWRY, *President.*

47 Extract from minutes of the executive committee of the board of directors of the Western Union Telegraph Company, meeting to be held October 1st, 1902, a quorum being present.

"The president reported to the committee that he had caused to be prepared a map showing the route of the lines of telegraph poles and wires, as now maintained and operated by the company from Philadelphia to Pittsburg, with the branches thereof, as shown upon said map, and extending to the boundaries between the State of Pennsylvania and the States of Maryland and New Jersey, and to other points within the State of Pennsylvania, and constructed upon the right of way of the railroad owned, leased, controlled or maintained and operated by the Pennsylvania Railroad Company, and the same was submitted to the committee. Thereupon, and upon motion duly made, the following resolution was unanimously passed:

Resolved, That, in the exercise of the power in it vested by virtue of the Constitution and laws of the United States, and of the constitution and laws of the Commonwealth of Pennsylvania, and by virtue of the lease made to it by the Altantic & Ohio Telegraph Company and the acts of the assembly of the Commonwealth of Pennsylvania, ratifying and confirming the same, and in the exercise of all and every other power in any wise enabling it so to do, this company does hereby locate a single line of telegraph over and along and upon the right of way of the railroad owned, maintained or operated by the Pennsylvania Railroad Company, and extending from the city of Philadelphia, through the counties of Philadelphia, Montgomery, Delaware, Chester, Lancaster, Dauphin, Perry,
48 Juniata, Mifflin, Huntingdon, Blair, Cambria, Westmoreland and Allegheny, to the city of Pittsburg, in the State of Pennsylvania, and also a single line of telegraph upon, over and along the rights of way of the following branch or connected railroads owned, leased or controlled, maintained and operated by the Pennsylvania Railroad Company, to-wit:

1. From the city of Philadelphia, in a northeasterly direction to a point in the center of the Delaware river, opposite Trenton, in the State of New Jersey;

2. From the city of Harrisburg, in a southwesterly direction through Mechanicsburg, Carlisle, Shippensburg, Chambersburg, and South Pennsylvania Junction to the Maryland State line;

3. From the city of Pittsburg, in a northeasterly direction to the town of Driftwood;

4. From Lewistown Junction, in a northerly direction to the town of Lewiston.

5. From Holmesburg Junction to Bustleton;

6. From Tioga Station to Mantua, both in the city of Philadelphia;

7. From Philadelphia, through Norristown, Phœnixville, Reading, Pottsville and St. Clair to New Boston Junction;

8. From St. Clair, through Mahanoy Plane to Shenandoah;

9. From Frazer to West Chester;

10. From Downington to New Holland;

11. From Pomeroy to the Delaware State line;

12. From Dillerville, through Columbia, York and Hanover, through Littlestown to Maryland State line;

13. From Middletown, through Columbia and Peach Bottom to Maryland State line;

49 14. From Bridgeport, through York, Hanover Junction and New Freedom to Maryland State line,

15. From Marysville, through Millersburg, Sunbury, Williamsport and town of Fasset to the New York State line;

16. From Sunbury through Shamokin to Mt. Carmel.

17. From Sunbury through Roaring Creek, Catawissa and Rock Glenn to Tomhicken;

18. From Catawissa through Nescopec, Moconaqua and Nanticoke to Wilkesbarre;

19. From Nanticoke to Glen Lyon;
20. From Nescopec to Rock Glen;
21. From Montandon through Lewisburg, Spring Mill and Bellefonte to Milesburg;
22. From Lewiston Junction through Lewiston and Selinsgrove to Sunbury;
23. From Lewiston to Logan;
24. From Tyrone through Vail, Milesburg and Lock Haven to Williamsport;
25. From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgway, Rolfe, Johnsonburg, Kane, Sheffield, Warren and Corry to Erie;
26. From Vail to Curwensville;
27. From Keating to Kasthaus;
28. From Philipsburg to Houtzdale;
29. From Snow Shoe Intersection to Snow Shoe;
30. From Ridgway to Falls Creek;
31. From Johnsonburg to Clermont;
32. From Altoona through Hollidaysburg to Williamsburg;
33. From Hollidaysburg to Henrietta;
34. From Cresson to Ebensburg;
35. From Blairsville Intersection through Freeport and Butler Junction to Butler;
36. From Blairsville to Indiana;
50 37. From Butler Junction to Allegheny;
38. From Greensburg through Uniontown to Fairchance;
39. From Uniontown through Brownsville and Monongahela City to Pittsburg;
40. From Chambersburg to Waynesboro;
41. From South Pennsylvania Junction to Richmond Furnace;
42. From Dillsburg Junction to Dillsburg;
43. From Redbank to Oil City;
44. From Millersburg to Williamstown,

and

Resolved, That this company does hereby, in the exercise of the powers aforesaid, appropriate, for the construction and maintenance of said line of telegraph, poles and wires and branches, and as and for the route thereof, so much of the right of way of said lines of railroad owned, leased, controlled, maintained or operated by said Pennsylvania Railroad Company and not in actual use for railroad purposes, and the streets, highways, water, bridges and lands occupied by or upon, over or through which said lines of road run, as is now occupied and used by the existing lines of telegraph poles and wires, as the same is now erected and constructed thereon; and also so much of said right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires thereon over and along the defendant" said railroads, where the said telegraph company now has no existing lines of poles; and which said part of said right of way is hereby declared to be neces-

sary for the construction and maintenance of said line of telegraph poles and wires, the same being so constructed, maintained, and operated on or near the edge of said right of way, as not to
51 interfere with the common use or operation of said line of railroad by said Pennsylvania Railroad Company, and subject to such reasonable changes of location of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use of and travel upon said railways; and the said telegraph lines and branches are particularly shown and delineated upon a map thereof this day submitted to this committee.

Resolved further, That the map submitted to this meeting is hereby made a part of this resolution and of the resolutions appropriating and condemning the right of way above described; and that the proper officers of the company are hereby authorized and directed to authenticate, by a certificate indorsed upon said map, under the corporate seal of the company, the map presented to and approved by this meeting as part of the proceedings hereof.

Resolved further, That the proper officers of this company are hereby authorized and directed first to acquire the rights of way thus appropriated and condeeemd, by negotiation, purchase, and contract if possible, and if not, then to institute, prosecute and defend all necessary actions *ta* law and in equity, or other proceedings which may be necessary for the a-quisition of the said rights of way, and locate, construct, maintain, operate a line of telegraph thereon, and for these purposes to make, execute, and tender any bond, bonds, or other securities that may be necessary in such legal proceedings, negotiation or contract to acquire said rights of way.

A true copy from the minutes.

[SEAL.] A. R. BREWER, *Secretary.*

52 Extract from minutes of special meeting of the board of directors of the Atlantic & Ohio Telegraph Company, held in the city of Philadelphia, Pa., on October 2nd, 1902.

The president reported to the board that the Western Union Telegraph Company had adopted the following action relating to the acquisition of rights of way along and upon railroads owned, leased, controlled, maintained or operated by the Pennsylvania Company, to-wit:

"The president reported to the committee that he had caused to be prepared a map showing the route of the lines of telegraph poles and wires as now maintained and operated by the company from Philadelphia to Pittsburg, with the branches therefrom as shown upon said map and extending to the boundaries between the State of Pennsylvania and the States of Maryland and New Jersey and to other points within the State of Pennsylvania and located and constructed upon the right of way of the railroad owned, leased, controlled or maintained and operated by the Pennsylvania Railroad Company, and the same was submitted to the committee.

Thereupon and upon motion duly made the following resolution was unanimously passed:

Resolved, That, in the exercise of the power in it vested by virtue of the Constitution and laws of the United States, and of the constitution and laws of the Commonwealth of Pennsylvania, and by virtue of the lease made to it by the Atlantic & Ohio Telegraph Company and the acts of the assembly of the Commonwealth of Pennsylvania ratifying and confirming the same and in the exercise of all and every other power in any wise enabling it so to do, this company does hereby locate a single line of telegraph over and along and upon the right of way of the railroad owned, main-
53 tained or operated by the Pennsylvania Railroad Company and extending from the city of Philadelphia through the counties of Philadelphia, Montgomery, Delaware, Chester, Lancaster, Dauphin, Perry, Juniata, Mifflin, Huntington, Blair, Cambria, Westmoreland and Allegheny, to the city of Pittsburg, in the State of Pennsylvania, and also a single line of telegraph upon, over and along the rights of way of the following branch or connecting railroads owned, leased or controlled, maintained and operated by the Pennsylvania Railroad Company, to-wit:

(1.) From the city of Philadelphia in a northeasterly direction to a point in the center of the Delaware river, opposite Trenton, in the State of New Jersey;

(2.) From the city of Harrisburgh in a southwesterly direction through Mechanicsburg, Carlisle, Shippensburg, Chambersburg, and South Pennsylvania Junction to the Maryland State line;

(3.) From the city of Pittsburg in a northeasterly direction to the town of Driftwood.

(4.) From Lewistown Junction in a northerly direction to the town of Lewistown;

(5.) From Holmesburg Junction to Bustleton;

(6.) From Tioga Station to Mantua, both in the city of Philadelphia.

(7.) From Philadelphia through Morristown, Phœnixville, Reading, Pottsville and St. Clair to New Boston Junction;

(8.) From St. Clair through Mahanoy Plane to Shenandoah.

(9.) From Frazer to West Chester;

(10.) From Downington to New Holland;

(11.) From Pomeroy to the Delaware State line;

54 (12.) From Dillerville through Columbia, York, and Hanover through Littlestown to Maryland State line.

13. From Middletown through Columbia and Peach Bottom to Maryland State line;

14. From Bridgeport through York, Hanover Junction and New Freedom to the Maryland State line;

15. From Marysville through Millersburg, Sunbury, Williamsport and the town of Fassett to the New York State line;

16. From Sunbury through Shamokin to Mt. Carmel;

17. From Sunbury through Roaring Creek, Catawissa and Rock Glen to Tom Hicken;

18. From Catawissa through Nescopec, Moconaqua and Nanticoke to Wilkesbarre;
19. From Nanticoke to Glen Lyon;
20. From Nescopec to Rock Glen;
21. From Montandon through Lewisburg, Spring Hill and Bellefont to Milesburg;
22. From Lewistown Junction through Lewistown and Selins Grove to Sunbury;
23. From Lewistown to Logan;
24. From Tyrone through Vail, Milesburg and *and* Lock Haven to Williamsport;
25. From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgway, Rolfe, Johnsonburg, Kane, Sheffield, Warren, and Corry to Erie;
26. From Vail to Curwensville;
27. From Keating to Kasthaus;
28. From Philipsburg to Houtzdale;
29. From Snow Shoe Intersection to Snow Shoe;
30. From Ridgway to Falls Creek;
31. From Johnsonburg to Clermont;
32. From Altoona through Hollidaysburg to Williamsburg;
33. From Hollidaysburg to Henrietta;
34. From Cresson to Ebensburg;
35. From Blairsville Intersection through Freeport and Butler Junction to Butler;
36. From Blairsville to Indiana;
37. From Butler Junction to Allegheny;
38. From Greensburg through Uniontown to Fairchance;
39. From Uniontown through Brownsville and Monongahela City to Pittsburg;
40. From Chambersburg to Waynesboro;
41. From South Pennsylvania Junction to Richmond Furnace;
42. From Dillsburg Junction to Dillsburg,
43. From Red Bank to Oil City;
44. From Millersburg to Williamstown.

And resolved, That this company does hereby, in the exercise of the powers aforesaid, appropriate for the construction and maintenance of said line of telegraph poles and wires and branches, and as and for the route thereof, so much of the right of way of said lines of railroad owned, leased, controlled, maintained or operated by said Pennsylvania Railroad Company and not in actual use for railroad purposes, and streets, highways, waters, bridges and lands occupied by or upon, over, or through which said lines of road run, as is now occupied and used by the existing lines of telegraph poles and wires, as the same is now erected and constructed thereon; and also so much of the right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires

thereon over and along the defendant's said railroads, where
56 the said telegraph company now has no existing line of poles; and which said part of said right of way is hereby declared to be necessary for the construction and maintenance of said line of telegraph poles and wires, the same being so constructed, maintained and operated on or near the edge of said right of way, as not to interfere with the common use or operation of said line of railroad by said Pennsylvania Railroad Company, and subject to such reasonable changes of location of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use of and travel upon said railways; and the said telegraph lines and branches are particularly shown and delineated upon a map this day submitted to this committee.

Resolved, further, That the map submitted to this meeting is hereby made a part of this resolution and of the resolutions appropriating and condemning the rights of way above described; and the proper officers of the company are hereby authorized and directed to authenticate, by a certificate indorsed upon said map, under the corporate seal of this company, the map presented to and approved by this meeting as part of the proceedings hereof.

Resolved, further, That the proper officers of this company are hereby authorized and directed first to acquire the rights of way thus appropriated and condemned, by negotiation, purchase and contract if possible, and if not, then to institute, prosecute and defend all necessary actions at law and in equity, or other proceedings which may be necessary for the acquisition of the said rights of way, and locate, construct, maintain and operate a line of telegraph thereon, and for these purposes to make, execute and tender any bond, bonds or other securities that may be necessary in
57 such legal proceedings, negotiation or contract to acquire said rights of way."

It was thereupon, on motion of Mr. George Morrihew, seconded by Mr. A. R. Brewer,

Resolved, That the corporate action aforesaid of the Western Union Telegraph Company be, and the same hereby is ratified, approved and confirmed by this company, and the said corporate action of the said Western Union Telegraph Company is hereby adopted as the corporate action of this company so far as it has power to do so, and said Western Union Telegraph Company is hereby authorized and empowered, so far as this sued company has authority to empower the said Western Union Telegraph Company on behalf this company to acquire for the lines of this company a right of way along and upon all the railroads owned, leased, controlled, maintained or operated by the said Pennsylvania Railroad Company, as set forth in the foregoing resolution.

A true copy from the minutes.

[SEAL.] A. R. BREWER, *Secretary.*

58 Extract from minutes of the board of directors of the Western Union Telegraph Company, meeting held October 15th, 1902.

The president brought to the attention of the board the action taken by the executive committee, at its meeting on October 1st inst., relative to the acquisition of the right to construct telegraph lines along and upon the right of way of the railroads owned and controlled by the Pennsylvania Railroad Company, which action was as follows, to wit:

"The president reported to the committee that he had caused to be prepared a map showing the route of the lines of telegraph poles and wires as now maintained and operated by the company from Philadelphia to Pittsburg, with the branches therefrom, as shown upon said map, and extending to the boundaries between the State of Pennsylvania and the State of Maryland and New Jersey and to other points within the State of Pennsylvania, and located and constructed upon the right of way of the railroad owned, leased, controlled or maintained and operated by the Pennsylvania Railroad Company, and the same was submitted to the committee. Thereupon and upon motion duly made the following resolution was unanimously passed:

Resolved, That, in the exercise of the power in it vested by virtue of the Constitution and laws of the United States, and of the constitution and laws of the Commonwealth of Pennsylvania, and by virtue of the lease made to it by the Atlantic and Ohio Telegraph Company and the acts of the assembly of the Commonwealth of Pennsylvania ratifying and confirming the same, and in the exercise of all and every other power in anywise enabling it so to do, this company does hereby locate a single line of telegraph over and along and upon the right of way of the railroad owned,
59 maintained or operated by the Pennsylvania Railroad Company, and extending from the city of Philadelphia through the counties of Philadelphia, Montgomery, Delaware, Chester, Lancaster, Dauphin, Perry, Juniata, Mifflin, Huntingdon, Blair, Cambria, Westmoreland and Allegheny, to the city of Pittsburg, in the State of Pennsylvania, and also a single line of telegraph upon, over and along the rights of way of the following branch or connecting railroads owned, leased or controlled, maintained and operated by the Pennsylvania Railroad Company, to-wit:

(1.) From the city of Philadelphia in a northeasterly direction to a point in the center of the Delaware river, opposite Trenton, in the State of New Jersey;

(2.) From the city of Harrisburg in a southwestwardly direction through Mechanicsburg, Carlisle, Shippensburg, Chambersburg and South Pennsylvania Junction to the Maryland State line;

(3.) From the city of Pittsburg in a northeasterly direction to the town of Driftwood;

(4.) From Lewistown Junction in a northerly direction to the town of Lewistown;

(5.) From Holmesburg Junction to Bustleton;
(6.) From Tioga Station to Mantua, both in the city of ——
(7.) From Philadelphia through Norristown, Phœnixville, Reading, Pottsville and St. Clair to New Boston Junction;
(8.) From St. Clair through Mahanoy Plane to Shenandoah;
(9.) From Fraser to West Chester;
(10.) From Downingtown to New Holland;
(11.) From Pomeroy to the Delaware State line;
(12.) From Dillerville through Columbia, York, Hanover, through Littletown to Maryland State line;
60 (13.) From Middletown hrough Columbia and Peach Bottom to Maryland State line;
(14.) From Bridgeport through York, Hanover Junction and New Freedom to the Maryland State line;
(15.) From Marysville through Millersburg, Sunbury, Williamsport and the town of Fassett to the New York State line;
(16.) From Sunbury through Shamokin to Mt. Carmel;
(17.) From Sunbury through Roaring Creek, Catawissa and Rock Glen to Tom Hicken;
(18.) From Catawissa through Nescopec, Moconaqua and Nanticoke to Wilkesbarre;
(19.) From Nanticoke to Glen Lyon;
(20.) From Nescopec to Rock Glen;
(21.) From Montandon through Lewisburg, Spring Hill and Bellefonte to Milesburg;
(22.) From Lewiston Junction through Lewistown and Selins Grove to Sunbury;
(23.) From Lewistown to Logan;
(24.) From Tyrone through Vail, Milesburg and Lock Haven to Williamsport;
(25.) From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgway, Rolfe, Johnsonburg, Kane, Sheffield, Warren, and Corry to Erie;
(26.) From Vail to Curwensville;
(27.) From Keating to Kasthaus;
(28.) From Philipsburg to Houtzdale;
(29.) From Snow Shoe Intersection to Snow Shoe;
(30.) From Ridgway to Falls Creek;
(31.) From Johnsonburg to Clermont;
(32.) From Altoona through Hollidaysburg to Williamsburg;
(33.) From Hollidaysburg to Henrietta;
61 (34.) From Cresson to Ebensburg;
(35.) From Blairsville Intersection through Freeport and Butler Junction to Butler;
(36.) From Blairsville to Indiana;
(37.) From Butler Junction to Allegheny;
(38.) From Greensburg through Uniontown to Fairchance;
(39.) From Uniontown through Brownsville and Monongahela City to Pittsburg;
(40.) From Chambersburg to Waynesboro;

(41.) From South Pennsylvania Junction to Richmond Furnace;
(42.) From Dillsburg Junction to Dillsburg;
(43.) From Red Bank to Oil City.
(44.) From Millersburg to Williamstown; and

Resolved, That this company does hereby, in the exercise of the powers aforesaid, appropriate, for the construction and maintenance of said line of telegraph poles, and wires and branches, and as for the route thereof, so much of the right of way of said lines of railroad owned, leased, controlled, maintained or operated by said Pennsylvania Railroad Company and not in actual use for railroad purposes, and the streets, highways, waters, bridges and lands occupied by or upon, over, or through which said lines of road run, as is now occupied and used by the existing lines or telegraph poles and wires, as the same is now erected and constructed thereon; and also so much of the right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires thereon over and along the defendant's said railroads, where the said telegraph company now has no existing line of poles; and which said part of said right of way is hereby declared to be necessary for the construction and maintenance of said lines of
62 telegraph poles and wires, the same being so constructed, maintained and operated on or near the edge of said right of way as not to interfere with the common use or operation of said lines of railroad by said Pennsylvania Railroad Company, and subject to such reasonable changes of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use of travel upon said railways; and the said telegraph lines and branches are particularly shown and delineated upon a map this day submitted to this committee.

Resolved further, That the map submitted to this meeting is hereby made a part of this resolution and of the resolutions appropriating and condemning the rights of way above described; and the proper officers of the company are hereby authorized and directed to authenticate, by a certificate indorsed upon said map, under the corporate seal of this company, the map presented to and approved by this meeting as part of the proceedings hereof.

Resolved further, That the proper officers of this company are hereby authorized and directed first to acquire the rights of way thus appropriated and condemned, by negotiation, purchase and contract, if possible, and if not, then to institute, prosecute and defend all necessary actions at law and in equity, or other proceeding which may be necessary for the acquisition of the said rights of way, and locate, construct, maintain, and operate a line of telegraph thereon, and for these purposes to make, execute, and tender any bond, bonds, or other securities that may be necessary in such legal proceedings, negotiation or contract to acquire said rights of way."

63 On motion it was

Resolved That the action of executive committee and the resolutions passed by it be and the same are hereby ratified, approved and confirmed, and each and every of the foregoing resolutions is hereby adopted and passed by this board the same as if the said resolution had been originally presented to and acted upon by this board, and the said resolutions are hereby made in all respects the action of this board.

A true copy from the minutes.

[SEAL.] A. R. BREWER, *Secretary.*

EXHIBIT 3.

To the Pennsylvania Railroad Company:

The Western Union Telegraph Company, acting for itself, and as operator of the Atlantic & Ohio Telegraph lines, having this day requested a price for privileges appropriated in behalf of itself and the Atlantic & Ohio Telegraph Company, as specified in a written request accompanied by copies of the resolutions appropriating rights and privileges sought to be acquired, and the Pennsylvania Railroad Company having this day refused to name such a price, the Western Union Telegraph Company respectfully tenders a bond in which it is principal and the American Surety Company of New York is surety, in the sum of one hundred thousand dollars ($100,000), to secure to the Pennsylvania Railroad Company and to the corporations owned, controlled and operated by it, any compensation or damages to which it or its leased or operated companies might be entitled, which may be agreed upon or determined in any legal proceedings prosecuted to ascertain the same. Dated, November 11th, 1902.

THE WESTERN UNION TELEGRAPH COMPANY,
By R. C. CLOWRY, *President.*

64 Know all men by these presents, that the Western Union Telegraph Company, principal, and the American Surety Company, surety, both said companies being corporations existing under and by virtue of the laws of the State of New York, (hereinafter called obligors) are held and firmly bound unto the Pennsylvania Railroad Company, a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania (hereinafter called obligee) in the sum of one hundred thousand dollars ($100,000), to be paid said obligee, its certain attorney, successors and assigns, to which payment well and truly to be made, said obligors bind themselves, and each of them, their respective successors and assigns, jointly and severally, firmly by these presents.

Witness the respective common and corporate seals of the said obligors, duly affixed hereto and attested by the signatures of their respective presidents and secretaries, or attorneys, the first day of

October, in the year of our Lord, one thousand nine hundred and two.

Whereas, said The Western Union Telegraph Company, obligor above named, has been and is now operating line of telegraph for public use, by and with the consent of the said obligee, and other railroad corporations owned, leased, controlled or operated by said obligee, upon and along the rights of way and properties of said obligee, and the railroad corporation aforesaid, and is desirous of continuing to maintain and operate said lines of telegraph, upon and along said rights of way and properties, to the end that said line of telegraph may be maintained and operated by said obligor perpetually upon and subject to the conditions and regulations that may be imposed upon said obligor in the use and occupation of said properties and rights of way, as may be imposed according to law, but otherwise to be free from the control of said obligee; and

Whereas pursuant to said corporate rights and franchises
65 vested in said principal obligor by law, it has, by due corporate action, located certain lines of telegraph and the necessary space for their maintenance and operation along and upon the rights of way and properties of said obligee and the railroad corporations owned, leased, controlled or operated by it, as aforesaid, as specified and described in and by "Schedule A," attached hereto, and shown upon the map forming part thereof, both said schedule and said map being specially made part hereof.

Now the condition of this obligation is such, that if said obligors, or either of them, shall pay or cause to be paid to said obligee such damages accruing by reason of the entry upon, use, occupation and appropriation of the right to construct, maintain and operate said lines of telegraph, together with the necessary space and land for their construction, maintenance and operation as may be agreed upon by said principal obligor and said obligee, or as may be awarded in proceedings to ascertain said damages according to law, then this obligation to be void, otherwise to be and remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,

(Signed) By ROBERT C. CLOWRY, *President.*

[SEAL.]

Attest:

(Signed) A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,

[SEAL.] By DAVID B. SICKELS, *Vice President.*

Attest: CORTLAND S. VAN RENSSELAER, *Attorney.*

66 STATE AND COUNTY OF NEW YORK, *ss:*

On this 1st day of October, 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one ef the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

(Signed) K. J. PIERCEY,
[SEAL.] *Notary Public, Kings County, No.* 5.

Certificate filed in New York Co.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other
67 than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of its attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cor-landt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and seal of the company at the city of New York, this 1st day of October, 1902.

(Signed) [SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

EXHIBIT No. 4.

To the Pennsylvania Railroad Company:

Please take notice: That the Western Union Telegraph Company will, on the 20th day of November, 1902, present the bond tendered this day to the Pennsylvania Railroad Company, in the sum of one hundred thousand dollars ($100,000), with the American Surety Company of New York as surety thereon, to the circuit court of the United States at Pittsburgh, State of Pennsylvania, for approval.

Dated Philadelphia, Penna., Nov. 13th, 1902.

THE WESTERN UNION TELEGRAPH COMPANY,
By H. D. ESTABROOK, *Its Solicitor.*

68 *Opinion.*

BUFFINGTON, *J.*:

This opinion concerns two cases brought in this court by the Western Union Telegraph Company against the Pennsylvania Railroad Company; one, a petition on the law side to condemn part of the railroad's right of way and appropriate it to telegraph purposes; the other, a bill on the equity side praying for an injunction to restrain the railroad from dispossessing the telegraph company during the pendency of said condemnation proceedings. Briefly summarized, the relations of the parties are as follows: The Atlantic & Ohio Telegraph Company is a corporation chartered by the State of Pennsylvania. On June 20, 1864, it entered into a contract with the Pennsylvania Railroad Company, whereby the latter granted permission to the telegraph company to place a telegraph line on the railroad's right of way. On April 15, 1864, the Atlantic & Ohio Telegraph Company had leased to the Western Union Telegraph Company, a corporation of the State of New York, all its property for ten years, the lease to be terminated after that time by either party on six months' notice. Thereafter the Western Union Telegraph Company operated the Atlantic & Ohio's telegraph lines on the railroad right of way. On September 20, 1881, the Western Union Telegraph Company and the Pennsylvania Railroad Company entered into a new contract covering this telegraph line. This contract was for twenty years, at the end of which time it could be terminated by the railroad on six months' notice. On May 15, 1902, the railroad gave the telegraph company notice of the termination of the lease and to remove its lines on December 1, 1902. On November 26, 1902, the Western Union Telegraph Company brought its petition and bill in equity in this court as noted above. As the

two are inter-related, we will dispose of the questions arising
69 under each in one opinion, which may be considered as filed in each case. We first take up the petition.

By it the Western Union Telegraph Company seeks to condemn and appropriate to its use for telegraph purposes a strip of ground located on the right of way of the Pennsylvania Railroad from Pittsburgh to Philadelphia, and upon numerous branches or connecting side lines as well. The total appropiation thus sought, indicated by an accompanying map, covers upwards of fifteen hundred miles of railroad right of way. The petition prays that this court approve a tendered bond in the sum of $100,000.00 and order the same to be filled "for the use and benefit of the Pennsylvania Railroad Company in its own behalf, and as the owner, leasee or operator of the railroads over whose properties the rights of way sought to be appropriated by the Western Union Telegraph extend;" that proceedings be had to determine the compensation to be paid; that upon payments of said sum into court or to the railroad, possession be adjudged of said "use, rights and interests;" and that the "title to the said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company."

An examination of the prayers of this petition in connection with the resolutions of the Atlantic & Ohio Telegraph Company and those of the Western Union Telegraph Company, its lessee, and in pursuance of which resolutions this proceedings is begun, shows that what if here sought to be appropriated is the ownership of, and title to, a part of the ground constituting the general right of way of the railroad company.

It is true there is, in the resolutions, a clause stating that what is appropriated shall be "subject to such reasonable changes of location of said poles, at the direction of said railroad company from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use and travel upon said railways."
70 We find no statutory provision or limitation for a condemnation of land which subjects it to such shifting and transient ownership and occupation as above suggested. If the petitioner is entitled to condemn and appropriate, it would seem it is entitled to have and to hold what it acquires and pays for. But it is, in any view, clear that this clause, if enforcible, would only permit the railroad to shift upon, but never remove from, its right of way the telegraph lines of the appropriating company. If the railroad's future needs should demand the occupation hereafter of the whole of its present right of way for additional tracks, or if its own telegraphic necessities required it to duplicate on the north side the private telegraph lines it now has on the south side of its right of way, it is evident that it could not exclude from such the north side, or at all events from its right of way generally, a telegraph company that had condemned and acquired what is here sought. Whether then, the land appropriated be a definite, fixed line, or a shifting strip subject to re-location by the railroad, it is certain it is some part of the railroad's right of way and that to such part the

telegraph company would acquire exclusive adverse ownership. Indeed, as we have seen, this is the object sought, viz: that "the title to said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company." And that a fixed location is in effect sought under this proceeding is shown in the prayer of the bill in equity for a permanent injunction: "that upon due payment of such compensation by your orator to the defendant, this court will order, adjudge and decree that your orator is entitled to a perpetual injunction against the defendant herein restraining it from in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendant." Under any view, as to the part so taken and occupied, even for the time being by the petitioner's poles, the railroad is excluded
71 from the use thereof for its tracks, for its own telegraph lines and for the lines of other telegraph companies whose tenancies might be highly remunerative and desirable, or whose facilities would substantially aid in the transaction of the railroad business.

This question of the future needs of the railroad, its unhampered control and sole use of its right of way, to enable it to fully perform its public duty of a common carrier, is one of grave importance. A railroad's right of way is the artery of its life; its acquisition and construction difficult and costly; the extent to which it can be used for additional track room the limit of the railroad's development. In taking from it any part of such ground, due regard should, therefore, be had to its future needs. It was well said by Judge McKennen in a case in this court, later referred to, "Every reasonable intendment must be made in favor of the primary rights of the complainant (in that case a railroad seeking to prevent part of its right of way being re-appropriated). * * * No actual encroachment upon these rights can be sanctioned or allowed; and in measuring there extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business." We deem the questions therein mentioned as to the future needs of a railroad in fulfilling its chartered purpose such as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way.

Now whatever the scope of the appropriation sought, and however the ownership thereof may be possibly qualified under the clause relating to re-location, it is clear that what is sought is an adverse, *in invitum* appropriation covering many hundred miles of railroad property, and that "the title
to said rights and interests, as against the defendant,
72 thereby vest in the said Western Union Telegraph Company." Indeed, the absolute and exclusive character of telegraph appropriation, with reference to a street, and the same may be said, *mutatis mutandis*, to the occupation of a railroad, is

stated by the Supreme Court of the United States in St. Louis *vs.* Western Telegraph Co., 148 U. S. 92: "But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies for transportation of messages."

The present question of the filing and approval of the bond tendered is on the surface of seemingly small import and might be regarded as a formal preliminary step in a legal contest. In reality, under the Pennsylvania decisions, as applicable to the facts of this case, approval by the court of the bond vests in the appropriating company as clear and perfect a title to the easement sought as though it had been bought and paid for. As was said in Hoffman's Appeal, 118 Pa. St., 512: "The privilege of taking private property for public use may, therefore, be constitutionally exercised by those invested therewith in one of two ways; either by actual payment or by giving security for the payment of compensation to the owner of the property taken. For example, if a railroad company agrees with and pays the landowner for right of way, it thereby acquires a clear right to the easement.

On the other hand, if the parties fail to agree, the same right
73 may be acquired by complying with the other constitutional alternative, viz: giving security for the payment of just compensation, in the manner prescribed by law. When the latter alternative is resorted to, and sufficient bond, with sureties approved by the court, has been given, the company acquires as clear and perfect right to the easement as if it had paid therefor in cash" The approval of this bond being then a decree which adjudges the right of the petitioner to take and the duty of the railroad to surrender, and being in substance a compulsory judicial conveyance to the telegraph company of title to property which may prove indispensable to the future needs of the present railroad owner, the duty, indeed, the obligation, resting upon a court, to be well assured of its right so to do, before taking such a far-reaching and irretrievable step, is apparent.

Now, the land here sought to be appropriated is to be regarded in two different relations: one public; the other private—for while it is private in ownership, it is public in use and duty. As constituting a part of a railroad right of way, it is by Federal as well as State law, and decision deemed a public highway, and as such dedicated or set apart to a public use. The constitution of Pennsylvania, art. 17, sec. 1, says: "All railroads and canals shall be public highways, and all railroad and canal companies shall be common

carriers;" and by the act of Congress of June 8, 1872, 17 Statutes at Large, 308, sec. 201, it is provided: "That all railways and parts of railways which are now or may hereafter be put in operation, are hereby declared to be post-roads." "The question," says the Supreme Court of the United States (Cherokee Nation *vs.* Kansas Railway Company, 135 U. S., 657,) "is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends."

74 But not only is a railroad made a public highway, but under the laws of Pennsylvania, land of a railroad or other corporation, necessary to the full enjoyment and exercise of a public use, is by virtue of being dedicated to such use, excepted from some of the liabilities incident to private property, in being exempt from levy and sale and incapable of corporate alienation, unless such power of alienation is conferred by the State. This "exemption," as it is said in Plymouth R. Co. *vs.* Colwell, 39 Pa. St., 339, "rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out." Such limitation exists not by reason of corporate ownership; Twelfth Street Market Co. *vs.* Philadelphia & Reading Terminal R. Co., 142 Pa. St., 580; but because of the public right to the public use, which ordinarily cannot be gainsaid or withdrawn by the owner.

But while the use to which such property is subjected is public, yet ownership thereof remains private. Thus Mr. Justice Grier, in Rundle *vs.* Delaware & R. Canal Co., 1 Wallace, 275, 21 Fed. Cases, p. 11, says: "In the popular meaning of the term nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet if the whole interest does not belong to the Government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus all bank, bridge, turnpike, railroad and canal companies are private corporations. In these and other similar cases, the uses may in a certain sense be called public, but the corporations are private, as much so as if the franchises were vested in a single person. Dartmouth College *vs.* Woodward 4 Wheat. (17 U. S.) 669." Freeman on Executions, sec. 126*a*, says: "The property of certain *quasi*

75 public corporations is held by them for the purpose of private gain, and has so far as its ownership is concerned, all the advantages of private property."

Seeing then that what is here sought to be appropriated is not only private property and of great value to its private owners, but that it is impressed with a Federal obligation and public use as a Federal post road, and with a State one as a highway and common carrier, it is evident that the right of the petitioner to divest private ownership and divert public use must be clear and free from uncertainty. Such right the petitioner claims to have by virtue of a power of eminent domain in it vested, first by the act of Congress of

July 24, 1866, and secondly by the constitution and statutes of Pennsylvania. Whether such powers and rights are so vested constitutes the underlying question of this case; but before considering it we deem it proper, so far as concerns the petition to condemn, to refer to and dispose of some other phases of this controversy.

At the argument it was contended on behalf of the railroad, *inter alia*, that such right of eminent domain as a telegraph company could exercise in Pennsylvania was confined to corporations chartered by that State; that whatever right was exercisable in the present case could be exercised only by the Atlantic & Ohio Telegraph Company, a Pennsylvania corporation, the lessor of the Western Union Telegraph Company; that the former company was a necessary but nonjoined party in the petition and that if made a party therein the jurisdiction of this court would be ousted; that the Pennsylvania Railroad Company, having its principal offices and being located in the eastern district of Pennsylvania, could not be sued in this case in the western district; that the present application to file and approve the bond was not a suit of action of law of which this court had jurisdiction, and that the right of eminent domain could only be exercised after a bond had been filed and approved in the State court in accordance with the Pennsylvania statutes. It is obvious, however, that unless the right of eminent domain is vested in the petitioner it will not be necessary to pass upon these and other questions involved. We will, therefore, for present purposes, assume, without deciding, that all these questions are with the petitioning company and address ourselves to those of alleged Federal and State rights of eminent domain.

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It is also proper to here remark that this proceeding to condemn is in no wise affected by the past or present relations between the Western Union Telegraph Company and the Pennsylvania Railroad Company. By the contract of September 20, 1881, noted above, the Pennsylvania Railroad Company granted to the Western Union Telegraph Company the "right to place, maintain and use upon the line of the right of way of the Pennsylvania railroad and of the railroads owned, operated or leased by it * * * a single line of telegraph poles * * * with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company." It provided for the payment of an annual rental by the telegraph company; it was "to continue in force for and during the term of twenty years" from its date; and the telegraph company should "at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires * * * and if not so removed, the railroad company may remove them at the expense of the telegraph company." It also provided that: "any easement or right of way heretofore acquired by the telegraph company upon any of the

roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and ease-
77 ments of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

Now whatever may have been the prior rights of the Western Union Company, which as noted above it expressly surrendered, it is clear its possession of the railroad property when this petition was filed was under the contract of September 20, 1881. That contract created a rental relation. As stated in St. Louis *vs.* The Western Union Telegraph Company, *supra*, it was "in the nature of a charge for the use of the property * * * that which may properly be called rental." Having entered into a contract of tenancy and its possession of the *locus in quo* being under an expressed covenant and an implied obligation to surrender at the termination of the tenancy, it is clear, as shown later in this opinion, that the tenant can avail itself of no pre-existing adverse rights to defeat the owner's dominant title. Nor can any rights enjoyed by the tenant under the lease and pursuant thereto be made a ground for denying the landlord the implied and covenanted right to have possession yielded and his dominant estate restored. In view, therefore, of the tenancy of the Western Union Telegraph Company under this contract; of the well recognized legal duty and "implied obligation on the part of the tenant to re-deliver the possession of the demised premises to his landlord upon the expiration of his term," 18 Amer. & Eng. Ency. of Law, p. 403; and of the express provision for surrender, the petition of the tenant, The Western Union Telegraph Company, to appropriate by eminent domain the property of its railroad landlord, should be treated as one wholly independent of the question of tenancy. If it be vested with the right of eminent domain, that right is neither dependent upon, increased by, or detracted from by its tenancy. In other words, while the right of the telegraph company to begin, during the
78 tenancy, a proceeding to condemn the demised premises, may for present purpose be assumed, it is equally obvious that such proceeding must stand wholly on the right to condemn, and that no rights or equities to such adverse proceeding can be based on the servient contract relation of tenancy under which the petitioner is in possession. The right, therefore, of this petitioner to appropriate by eminent domain will be considered precisely as in the case of any third corporation vested with the petitioner's corporate rights, seeking like relief. It is obvious also the suggestion that some permanent right was vested in the Atlantic & Ohio Telegraph Company, under the prior contract, does not affect this petition to condemn. The resolution of that company approving the resolutions of the Western Union Telegraph Company to appropriate by condemnation this right of way, is based on the implied assumption of

ownership by the railroad of the property so sought to be appropriated. It is a resolution to acquire, by virtue of the public right of eminent domain; not to enforce or suggest any private right or claim. It is obvious, therefore, that the averment of possible right in the Atlantic & Ohio Telegraph Company has no pertinency to this petition.

Another preliminary matter should be referred to. The Pennsylvania Railroad Company, prior to the beginning of this proceeding, entered into a contract with the Postal Telegraph-Cable Company, dated June 25, 1902, whereby the railroad in substance agreed, in consideration of certain rentals, to furnish that company with pole facilities upon its right of way for fifteen years, and permit the telegraph company to use the same for its wires. Inasmuch as the private telegraph lines of the railroad now occupy the south side of its right of way, and to furnish the pole facilities provided for in this contract the railroad intends to place poles owned by itself on the north side and occupy the location now used by the
79 Western Union Telegraph Company, it is contended the contract in question violates art. 16, sec. 12, of the constitution of Pennsylvania, which provides: "No telegraph company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph company owning a competing line or acquire, by purchase or otherwise, any competing line of telegraph." This clause has no reference to this case. Certain it is by this contract the Postal Telegraph-Cable Company did none of the acts thereby inhibited. It has not consolidated with the petitioning company, it has no proven controlling interest in its stock or bonds, nor has it acquired by purchase or otherwise, any competing line. It further appears the railroad company notified the Western Union Telegraph Company to remove all of its poles, wire and property from its right of way, so that neither directly or indirectly is it proposed that the Postal Telegraph-Cable Company shall in the fulfillment of this contract, "acquire, by purchase or otherwise, any other competing line of telegraph." Moreover, it is apparent that the validity or non-validity of such contract can in nowise affect the question whether prior legislation vests the right of eminent domain in this petitioner.

Turning then to the underlying question, let us ascertain what powers of eminent domain, State or Federal, are vested in the petitioning company. Eminent domain is one of the highest attributes of sovereignty. By it the sovereign power, State or Federal, is enabled to take private property and appropriate it to public use. But subject to this sovereign power, private ownership is absolute, and such absolute ownership is safeguard- by a two-fold constitutional protection, viz.: it can only be taken away by due process of law and then on payment of just compensation. Amendment V of the Constitution of the United States provides: "No person shall * * * be deprived of life, liberty, or property, without
80 due process of law; nor shall private property be taken for public use, without just compensation."

It is also true that the sovereign State or nation can, by virtue of its superior dominion or eminent domain, reappropriate to an additional or secondary public use property it has once set apart to public use. For it must be apparent that the sovereign power cannot by dedicating property to one use preclude itself from rededicating the same property to some other public need. To do so were to defeat the purpose for which alone sovereignty exists—to promote the public good; *salus populi est suprema lex.* It will, therefore, be apparent that the Federal Government in promoting Federal constitutional powers and the State in its sphere have the sovereign right to appropriate private property to public use and to reappropriate property once set apart to public uses to other and additional ones.

Now, as a telegraph line is a recognized factor of commerce (Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, 96 U. S., 1), and therefore a public use, the right of the nation and State to exercise the power of eminent domain to appropriate property for telegraph purposes is clear. But while the right is undoubted, its enforcement affects the otherwise absolute right of private property, protected, as we have seen, by constitutional safeguards. The right to take, *in invitum*, the property of the subject is the most absolute power of sovereignty; the surrender of ownership, the abridgement of fundamental and constitutional right. It is manifest, therefore, that one who claims a delegated right to exercise this sovereign power must show a clear right, and that whatever is not expressly given or *ex necessitate* implied must be deemed withheld. And where not only private property but public uses are affected, the right to appropriate should be certain in that regard.

Inhabitants of Springfield *vs.* Connecticut River R. Co., 4
81 Cush., 73; In the matter of the City of Buffalo, 68 N. Y. 171;
In the matter of the Boston & Albany Railroad Co., 53 N. Y.
577.

Let us then inquire whether Congress has delegated the power of eminent domain by the act of July 24, 1866. Sec. 1 of that act, 14 Statutes at Large, 221, now embodied, though not in exact words, in sections 5263 and 5264 of the Revised Statutes, enacts: "That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of

telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres to each station; but such stations shall not be within fifteen miles of each other." The declared object of this act is to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." These expressed purposes are fulfilled by the act, even if the right of eminent domain is not delegated. The statute was passed at a time when transcontinental rail and telegraph lines through the public domain were in construction or contemplation.

82 No special ground calling for legislation so far as existing lines of railroad were concerned, is shown to have then existed. Indeed, the record in this case shows that both prior thereto and since, railroad companies were contracting with telegraph companies, in order to secure the installation of telegraphs along their lines as a help to railroad operation. Material property, and aid by way of privilege, were given by the Government in the right to "construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States" and "over, under or across the navigable streams or waters of the United States;" in the free right to use necessary stone, timber and other materials from the public land, and to pre-empt forty acres of land for each station. An inter-state franchise, free from State interference, was conferred in the right "to construct, maintain and operate lines of telegraph * * * over and along any of the military or post-roads of the United States, which may have been or may hereafter be declared such by act of Congress;" Pensacola Telegraph Co. *vs.* The Western Union Telegraph Co., *supra*. It will, therefore, be seen that in these substantial and valuable property and franchise rights the expressed purposes of the act were fulfilled, and there is no necessity to superadd the right of eminent domain. Such grant is not essential to the enjoyment of the franchise conferred. Moreover, since the constitutional inhibition to which reference has been made, provides that "No person shall * * * be deprived of * * * property without due process of law; nor shall private property be taken for public use, without just compensation," thus coupling the right to take by "due process of law" with the render of just compensation of, it would seem that if Congress intended by this act to empower the taking of private property, it would have made provision for ascertaining compensation. In the absence of any imperative demand for an implied grant of the right of eminent domain, the omis-

83 sion of provision for compensation is an argumentative, if not, indeed, a cogent, reason for concluding that no grant of the right to take private property was contemplated. Provision for compensation may imply power to take: Linton *vs.* Sharpsburg Bridge Co., 1 Grant (Pa.) 415; absence thereof suggests no power to take was intended: Chamberlain *vs.* Elizabeth, 41 N. J. Eq., 43. Moreover, the express grant of public, and the non-refer-

ence to private property is pregnant proof that private property rights were not meant to be affected: mention of the one was the exclusion of the other. In Murphy *vs.* Kingston, etc., R. Co., 11 Ont. Rep., 582, it was held that Statute *vs.* Victoria, c. 64 (D), which empowered a railroad company "to own and hold land in any municipality through or in which the main line or any branch was carried, for the erection and maintainance thereon of stations, sidings, etc., as might be necessary for the purpose of the company" did not empower them to appropriate against the will of the owner.

There being no express grant of the right of eminent domain in this act, as it is clear there is no implied one. The grant, outside of Federal property was, as we have seen, "to construct, maintain and operate lines of telegraph * * * over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress." While it is true that a right to condemn may be implied of necessity when the grant itself would be defeated unless such power were implied, yet such necessity is one arising not from the act of the party seeking to avail himself of the right, but from the law itself; it is one proceeding from the nature of things, over which the party has no control, and not from mere convenience or economy: Lewis on Eminent Domain, sec. 240.

Now the conformation of a country in the way of defiles, rock formation and streams might be such that two authorized
84 roads—rail, highway or turnpike—would be physically required to use in common a sole permissible grade and location, or be compelled to make an unreasonable detour. But grade is not a necessary factor in telegraph construction. There is no physical reason why a telegraph company cannot as well use for its lines a strip of land along, or within reasonable reach of a roadway or railroad as place them upon the particular ground already appropriated by such road. Such being the case, it is manifest that an attempt by a telegraph company to use the entire length of a railroad for its lines, as it is here sought to be done, is not based upon imperative necessity, without which its grant "to construct, maintain and operate" would be defeated, but that such proposed location is a matter of economy and convenience. It is clear, therefore, that from the nature of things, no implied grant of a Federal power of eminent domain is essential to the enjoyment of the franchise conferred by this act. Indeed the case of The Pensacola Telegraph Co., *vs.* The Western Union Telegraph Co., referred to above, notably illustrates the efficacy of the act to secure to a telegraph company, even against hostile legislation, full enjoyment of the right to operate its lines "over and along any of the military or post roads of the United States," without delegation of the right of eminent domain.

Out of deference to the earnest argument of counsel representing the telegraph company, who contend the construction of the act of 1866 in that regard is an open one, we have discussed it as such and indicated our independant views. But as we read the decisions, we think the question has been settled by the

Supreme Court of the United States. This statute first came before that tribunal in Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, *supra*. An examination of that case shows that its construction was there involved. The appellant, in the argument of counsel, contended the statute
85 simply conferred on telegraph companies "a right of way over the public domain;" then it extended "only to such military and post-roads as are upon the public domain," and, therefore, had no application to the case in hand, that of a telegraph line constructed on a railroad not on a public domain. The court, however, held the act extended to military and post roads generally, in addition to those on the public domain, but that no attempt was made thereby to confer rights to private property. In defining what the law did provide and mean, the court, to meet criticism of it, stated what it did not provide. It showed it extended to all military and post roads of the United States, and, therefore, to the railroad on which the telegraph in controversy was located, but that it did not affect private property. It was there said by Chief Justice Waite: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is acquired, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

In the case of The Western Union Telegraph Company *vs.* Ann Arbor R. R. Co., 178 U. S., 243, the construction placed upon the statute in the Pensacola case was restated and approved. The right of the telegraph company in the Ann Arbor case to a review by the Supreme Court was in question, and such right depended on the existence of a Federal question. In the complaint in the State court, where the case was originally brought, the allegation of the bill was that the telegraph company had accepted the provisions of the act in question, and that independent of the contract made with the railroad it had "a right to maintain its telegraph line on what
86 was formerly said Frankford and South Eastern railroad under the provisions of the statute of the United States." If this allegation of a property right, independent of the contract, and based on the provisions of the act of 1866, did not as the court said "really and substantially involve a dispute or controversy as to the effect and construction of the Constitution or laws of the United States, upon the determination of which the result depends," then it was "not a suit arising under the Constitution or laws," and the judgment of the State court was not reviewable by the Supreme Court. It was accordingly held that the cause of action was one based on contract, and that the construction of the act of 1866 was not involved, and the judgment not reviewable. As we read the decision one reason why the complaint could not be regarded as raising a Federal question was that the court would not, in view of its con-

struction of the statute in the Pensacola case, permit it to be asserted as a ground of Federal jurisdiction. In that regard, the court, speaking by Chief Justice Fuller, said: "It has long been settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide, that, whenever the consent of the owner is obtained no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporation as are willing to avail themselves of the privileges.' Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, 96 U. S. 1. * * * As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a construction to be raised as a basis of jurisdiction."

87 If the construction thus given this statute is the supreme law of the land and binding upon all inferior tribunals, as it unquestionably is, we must hold, as we do, that the act of 1866 does "not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business," and no such Federal right of eminent domain as this particular petitioner claims is vested in it thereby.

We next inquire whether a right of appropriation is vested in the Atlantic & Ohio Telegraph Company, the lessor of the Western Union Telegraph Company, by the constitution and statutes of Pennsylvania. As stated above, we have assumed for present purposes that any right of eminent domain possessed by the Atlantic & Ohio Telegraph Company is vested in the Western Union Telegraph Company. What, then, are the terms of the statutory and constitutional grant to the former company, and what is the construction given such grants by the supreme court of Pennsylvania? Is the Atlantic & Ohio Telegraph Company authorized to appropriate land already appropriated for use as a railroad right of way? The Pennsylvania act of March 24, 1849, incorporating that company constitutes it a body corporate "for the purpose of making, using and maintaining telegraph lines and communication by one *or more routes* between the cities of Philadelphia and Pittsburg and intermediate places." By certain other legislation; not necessary to here specify, it was empowered "to purchase, make, use and maintain any connecting or side lines." It should be noted in passing that the route between Philadelphia and Pittsburgh, the termini of the charter, covers some three hundred and fifty miles of the total right of way sought to be appropriated. Section V of the charter provides: "That it shall and may be lawful for the said corporation hereby created, to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this State; the said works to be so placed as not to interfere with the common use of such roads, high-

88 ways, streets and waters." It further provides that: "The said corporation and all other persons by them authorized,

appointed or employed, shall have power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing the said telegraph lines, and using, repairing, maintaining and enjoying the same, upon which the same may be located, or which may be necessary or convenient for the location of the same."

Now, this section it will be observed, consists of two parts. The first makes it lawful for the corporation to construct "along and across any of the roads, highways, streets, and waters within this State;" the second confers power and authority "to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing the said telegraph lines, and using, repairing, maintaining and enjoying the same, upon which the same may be located, or which may be necessary or convenient for the location of the same." Several things are clear in the construction of this early statute, for it was passed in the early stage of both railroad and telegraph development. As the act contemplated the construction of one or more routes between the cities of Philadelphia and Pittsburgh, there was no implication that any one route was essential to the enjoyment of the franchise to construct. Not only is no mention made of a railroad or railway in the act, but it was not until a later period that these charter termini were connected by rail. But when the charter was granted the two cities named were connected by systems of public roads or highways. It is obvious, therefore, that in the grant of a corporate franchise to construct one or more routes, the legislature did not contemplate the then use of railroads, for there was then no such connecting railroad line, but provided other means by which one or more routes could be secured across the State and fully enjoyed. These means consisted in the free grant—for no provision was made for compensation therefor—"along and across any of the roads, high-
89 ways, streets and waters within this State;" and the other in the power "to enter into and upon, hold, occupy and enjoy any land for the purposes," etc., making compensation, of course, to the owner. It will thus be seen that the purpose of the grant could be fulfilled without embracing railroads. They are not mentioned, and very probably were not at that early day meant to be included in the general terms, "roads, highways and streets." At that time no legislation in Pennsylvania defined them as highways, and the context shows that the roads, highways and streets contemplated were such as were open to common use, *i. e.*, the public property, for it was enacted that the telegraph was to be placed so as "not to interfere with the *common use* of such roads, highways, streets and waters." Evidently this language referred to public property of a kind the public had a common right to use. While a railroad is a public highway in the sense it is a common carrier and has a public use to fulfil, yet it never becomes a public highway in the sense it is subject to common use. It is public in the common duty it owes the public, but private in operation and use to fulfil such duty. The authorities are clear that the public cannot make common use

of it as a public passage way, and that one doing so subjects himself to the liability of a trespasser: The Philadelphia & Reading Railroad Company *vs.* Hummell, 44 Pa. St. 378.

The most that can be said of this charter is that it leaves it a debatable question whether it extends to railroads. We have seen it does not by express words; we have seen it expressly grants the privilege of entering upon certain property already subjected to a public use and its mention of specific kinds of such public uses as rights of way upon which the telegraph company might enter, implies non-inclusion of property in other and different kinds of public use; we have seen that the use of a railroad was neither essential to the enjoyment of the franchise, and that ex-
90 press provision was made for its enjoyment in other ways. It would seem, therefore, that neither in express terms or by imperative indication to fulfill the charter object, is the right to enter upon a railroad given by this charter, and that a power to appropriate railroad property was not essential to the franchise to construct a telegraph line between Philadelphia and Pittsburg is evidenced by the charter. Indeed, that instrument itself shows that prior to its grant, and therefore without its aid or the exercise of the power of eminent domain, there was, vid-sec. 2 of the charter, "a telegraph line now in use between the cities of Philadelphia and Pittsburg * * * (which) shall be taken and considered to be the capital of said corporation." The claim for an implied power is met by the fact that the expressed power is sufficient to effect the charter object; "The implication does not arise, if the powers expressly conferred can, by reasonable intendment, be exercised without the appropriation of property already actually held and used for another public use: Boston & Albany R. R. Co., *supra;* Springfield *vs.* Conn. R. R. Co., *supra.*

The general principles and rules of construction applicable to such charters are fairly stated in vol. 10 Amer. & Eng. Ency. of Law, page 1054, as follows: "Since the exercise of the powers of eminent domain—the taking of a man's property without his consent—is against common right, it cannot generally be implied from a grant of authority to construct a public work. In order for a corporation to exercise the power, the right must be granted by express terms or by necessary implication. Therefore all acts relating to the taking of private property are to be strictly construed and not extended by implication. * * * But in some cases it has been said that if the implication in favor of the intended exercise of the power is very strong—for example that the grant itself would be defeated if the company were not allowed to condemn—the right to con-
91 demn may be exercised, on the theory that an implied right has been granted." This statement is in accord with the Federal view: Charles River Bridge Co. *vs.* Warren Bridge Co., 11 Peters, 425, and with the Pennsylvania decisions. Thus in the Pennsylvania Railroad Co.'s appeal, 93 Pa. St., 159, where that company sought to take the property of a street railway, the supreme court, in an able opinion by Chief Justice Gordon, announced the

rule, which has since been followed, where a corporation seeks to construe a corporate grant so as to interfere with a previous grant of the same kind. It was there said that the plea of necessity "must be tested by the rule, now of universal acceptation, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be held in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind;" In the later case of Groff's appeal, 128 Pa. St., 632, the same doctrine was reannounced by that court in an opinion by Mr. Justice Mitchell, wherein he said: "It has been settled, since the cases of Kensington Plan, 2 R. 445, and Philadelphia and Trenton R. Company, 6 Wharton, 25, that property devoted to public uses, including franchises, is subject to eminent domain, and may be taken for other public uses; but it is equally settled that it cannot be so taken without legislative authority expressed in clear terms, or by necessary implication. * * * In the long line of decisions from Stormfeltz *vs.* Manor Turnpike Co., 13 Pa., 555, down to Pittsburg Junction R. Co.'s appeal, 122 Pa. St., 511, the rule itself has never been questioned. * * * The imperative and inevitable nature of the implication requisite has been laid down in all our cases, and nowhere more strongly than in some of the most recently and carefully considered: See Pittsburg Junction R. Co.'s app., 122 Pa., 511; Penn'a R. Co.'s appeal, 93, Pa., 150; Penn'a R. Co.'s
92 app. 115 Pa., 517; Stormfeltz *vs.* Manor Turnpike Co., 13 Pa., 555; Cake *vs.* P. & E. R. Co., 87 Pa., 307; Tyrone School District's appeal, 22 W. N., 513."

In the Pittsburg Junction R. R. Co.'s app., 122 Pa. St., 526, the right of one railroad to extend its line through a yard of another arose. Such taking was there enjoined, the court citing and relying upon the opinion of Judge McKennan in this court in the case of The Lake Shore, etc., R. R. Co. *vs.* The Williamsport, etc., R. R. Co., 8 Fed. Rep., 858, that "every reasonable intendment must be taken in favor of the rights of the complainant. At the points of the alleged conflict no actual encroachment upon their rights can be sanctioned or allowed, and in measuring their extent there must be a liberal consideration of the future, as well as the existing necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons and the unembarrassed transaction of its freight business," and restating the law as declared in the Pennsylvania R. R. Co.'s appeal, 93 Pa., which we have cited above. The cases of Sharon Railroad Company's appeal, 122 Pa. St., 533, and Twelfth Street Market Co. *vs.* Philadelphia & Reading Terminal R. Co., 142 Pa. St., 581, are to the same effect.

Such being the limitations placed by the Pennsylvania decisions upon appropriating railroads, we see no reason forbidding, and every reason suggesting, the same limitations should be enforced in the case of the telegraph companies. In railroad location, as we

have noted above, grade is an essential factor; in telegraph construction it is at most a mere convenience. In railroad construction the narrowness of defiles, the opening of gorges, the location of streams, the general topography of the country, or the lack of curve space may, under certain circumstances, render it imperatively necessary that a second road should entrench upon a primary location. None of these factors ordinarily create imperative necessity in the case of telegraph lines. With them grades may be ignored, gorges avoided, hills or mountains crossed. In other words, there is no necessity in the nature of things that ordinarily requires a telegraph line to be placed on a railroad right of way; its location there is obviously a matter of convenience and economy. Indeed, an examination of the petition in this case shows that no allegation is made, and it is quite apparent from the nature of things that none could be made, that there is any imperative necessity for the location by the telegraph company of its poles on the railroad right of way. While the petition avers the patent fact that "it is necessary for continued maintenance and operation of its said lines of telegraph" that it should have the right to use and maintain poles along the right of way, yet it does not, and of course could not, aver that such occupation is necessary to the enjoyment of its franchise. Under the laws of Pennsylvania, public roads being the property of the State, are subject to its direction and control. "In England a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania," says the Supreme Court, in Philadelphia & Trenton Ry. Co., 6 Wharton, 43, "it is the property of the people, not of a particular district, but of the whole State, who, constituting as they do the legitimate sovereigns, may dispose of it by their representatives and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control."

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Such being the case, it is manifest that in its grant to the Atlantic and Ohio Telegraph Company of a right to construct "along and across any of the roads, highways, streets and waters within this State," the State has, to the extent of its ability in that regard, made provision by its highway system for that company to exercise its corporate franchise of constructing a line or lines from Philadelphia to Pittsburgh. It is therefore apparent that there is no necessity to read into this charter as a power requisite to the fulfillment of the charter object an implied right of eminent domain enabling it to reappropriate property already subjected to public use as a railroad right of way, inasmuch as the State has conferred an express grant of a right of way over public property in its roads, highways, streets and waters sufficient to enable the company to effectuate the object of its creation.

94

In the case of The New York City & Northern Railroad Company *vs.* The Central Union Telegraph Company 21 Hunter, 261, a substantially similar charter grant to the one here in question was held not to authorize entry on a railroad. It was there held a "special authority to a telegraph company to build upon, over or under any

public road, street or highway, is to be construed strictly, and does not authorize construction over a railroad." From these authorities, as well as from independent reasoning, it would therefore seem clear that no right of eminent domain to enter upon the rights of way of railroads was conferred upon the Atlantic & Ohio Telegraph Company by its charter.

This court being then of opinion from its own independent examination that no Federal right of eminent domain was vested in the Western Union Telegraph Company by the act of 1866, authorizing it to appropriate the right of way of the Pennsylvania Railroad Company, and that no State right of eminent domain was vested in the Atlantic & Ohio Telegraph Company which warranted the appropriation of said right of way, and such conclusion being in accord with the decisions of the Supreme Court of the United States and of the supreme court of Pennsylvania severally relating thereto, the duty of this court to refuse to approve this bond and to order this petition dismissed is clear.

95 We next consider the bill filed on the equity side of the court wherein the Western Union Telegraph Company seeks a preliminary injunction against the Pennsylvania Railroad Company "pending the determination of the said action at law" and "such other and further relief as the case may require." The action at law referred to is the petition to condemn, which, being dismissed, constitutes no ground for relief under this bill. In considering the questions involved in the general prayer for relief, it will be noted that our jurisdiction in this bill rests on the diverse citizenship of the two parties litigant, the Western Union Telegraph Company, a corporation of the State of New York, and the Pennsylvania Railroad Company, a corporation of Pennsylvania, and it will be further especially noted that these parties hold to each other the relation of landlord and tenant. The Western Union Telegraph Company, since September 20, 1881, has been in possession of the right of way in question as a tenant of the Pennsylvania Railroad Company under lease. It has attorned to the railroad during that long period and acknowledged its paramount title by the payment of rent. When this bill was filed, Nov. 26, 1902, the notice to quit on December 1, 1902, had not matured, and the telegraph company was then in lawful possession as a tenant under the lease. Moreover, it will be observed, that one of the grounds for relief here urged is that by an alleged extension of the lease by waiver of the notice to quit this relation of tenancy continued after December 1, 1902, or, as stated by complainant's brief, "Complainant bases its right to ultimate recovery in this controversy upon any one of the following propositions: First, that respondent waived its notice to quit by its subsequent unqualified acceptance of an aliquot monthly payment of a specified yearly rental reserved in the contract, which sum it still retains and does not offer to refund." It will, therefore, be seen that this bill is one between landlord and tenant, and relief is asked by

96 reason of the existence and continuance to the present time of the relation of tenancy. It is the case of a tenant seeking to

enjoin the landlord from re-entry, and the general legal principles applicable to a suit between landlord and tenant apply thereto. Now there is probably no principle of law more firmly settled than that a tenant is not permitted to attack or impeach his landlord's title. It is based on sound and wholesome reasons. The possession of the tenant is in law regarded as that of the landlord, and where a relation of tena-cy has once been fairly and advisedly established between parties, the law will not permit the tenant, so long as he holds possession of the property, to litigate, to retain possession on the basis or averment that the title is not in the landlord. The tenant's mouth is not closed to assert the truth. If the tena-cy was procured by fraud, deceit or misrepresentation of the landlord, the tenant is allowed to prove such fraud and show that the relation of landlord and tenant never in fact existed; Baskin *vs.* Seechrist, 6 Barr, 163; Smith *vs.* McCurdy, 3 Phila., 488. If after becoming a tenant he desires to assert a title adverse to that of the landlord he can do so, but he must first repudiate his tena-cy, and if called upon surrender possession. So long as he remains a tenant the relation of tena-cy estops him from attacking the landlord's title. The grounds for the rule are well summarized in 11 Amer. & Eng. Ency. of Law, 443: "The principle upon which this doctrine is based is, that the title of the lessee is in fact the title of the lessor. He comes in and holds by virtue of it and rests upon it to maintain and justify his position. He professes to have no independent right in himself and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease and that possession shall be surrendered at its expiration; and hence he cannot deny the lessor's title without breach of good faith and common honesty." While the rule is rec-
97 ognized as a general abstract principle of law and as one which courts enforce, yet in cases like this where large interests are at stake, and its enforcement might seem to preclude a litigent from asserting supposed rights, it is well to turn to some of the master minds of the law and from their words learn the sound reasons and just grounds whereon this "long settled and salutary rule," as it was styled by the Supreme Court of the United States in Scott *et al. v.* Rutherford, 92 U. S., 107, rests. These reasons not alone vindicate the rule's existence, but serve to show that its enforcement prevents litigation and exactly awards to both parties to a tenancy the result they expected when they assumed that relation. In Blight's Lessee *v.* Rochester 7 Wheat. 547, Chief Justice Marshall says: "This principle originates in the relation between lessor and lessee, and so far as respects them is well established, and ought to be maintained. The title of the lessee, is in fact, the title of the lessor. He comes in by virtue of it, hold- by virtue of it, and rest- upon it to maintain and justify this possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claimes that the paramount ownership of the lessor shall be acknowledged during the continu-

ance of the lease, and that position shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he can not set up the title of another, without violating that contract by which he obtained and holds possession; and breaking the faith which he has pledged, and the obligation of which is still continuing, and in full operation." The Pennsylvania rule and the ground on which it stands are well stated by Judge Black in Thayer *vs.* Society of United Brethren, 20 Pa. St. 62: "A lease given in good faith by one party and accepted by another with his eyes open, is valid and binding on both, though the actual occupancy is not changed. It creates the relation of landlord and tenant. It is a solemn admission of the lessor's title.
98 It disarms him of the power to take possession during the term, and therefore ought to be conclusive of his right to do so afterwards. The mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud or accepted by mistake. The lease is not rendered void by proving title in the lessee. To make the law otherwise, would be to say that the tenant shall not set up title in himself, when he has none, and that the lease shall be no evidence of the landlord's rights except when he can prove them without it."

Now the spirit of the rule requires its application not only where possession is first acquired by virtue of the tenancy, but where there has been a prior adverse possession and such adverse possession is changed to one under a tenancy evidenced by lease. Rankin *vs.* Simpson, 19 Pa. St. 475, as well as the case last cited, so rules: "If a purchaser by parol take possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than that with — he entered, he lets go his equities, and his possession is referred to his new agreement. And where the agreement, as in this case, is reduced to writing in terms perfectly inconsistent with the idea of a parol sale, it becomes the most faithful memorial which ingenuity can devise or the law adopt."

In the present case such rule of estoppel applies. Indeed, the facts show the case is a peculiarly proper one for its enforcement. Whatever may have been on September 20, 1881, the rights of the Atlantic & Ohio Telegraph Company, and to these we refer later, or those of the Western Union Telegraph Company, as its lessee, the latter company on that day, entered into a contract with the Pennsylvania Railroad Company whereby the relation of landlord and tenant was created. As a badge and incident of such tenancy it agreed to pay a rental, and as a fruit of such tenancy it has had undisturbed possession of
99 and used a telegraphic right of way for twenty-one years on the land of the railroad company. No fraud or misrepresentation is alleged in the making of the lease, or in the creation of this relation of landlord and tenant. Indeed, from the terms of the lease, it is clear that one of its objects was to put an end to all prior claims by placing the parties thereto in the relation of tenancy, and that, as stated in the lease, "the rights and easements of the tele-

graph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination." The purpose to accept a servient, terminable tenancy is made clear in the contract of September 20, 1881, wherein the Western Union Telegraph Company stipulated: "This agreement is to continue in force for and during the term of twenty years from its date. * * * If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company." The purpose to forego all other claims and relations is evidence- by its release in these words: Any easement or right of way heretofore acquired by the telegraph company, upon any of the roads embraced in this agreement or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

100 The contention of the tenant, the Western Union Telegraph Company, that it had no right to surrender or release the telegraphic right of way of its lessor, the Atlantic & Ohio Telegraphic Company, because such right was inalienable, and its act in that regard was *ultra vires*, cannot, even if well taken, affect the present case. In effect this is but to *to* attack the landlord's title. In substance it says, no title was vested in the railroad by such release or conveyance. This, as we have seen, under the law, so long as the tenant holds possession under the lease, will not permit. Moreover, the estoppel in this case, be it observed, does not depend upon the capacity of the Western Union Telegraph Company to release the rights of the Atlantic & Ohio Telegraph Co., and the validity of such release. The estoppel the law here enforces is not an estoppel by deed; it is not based on the validity of this release. It stands on higher ground; it is one created by the relation of the parties—landlord and tenant. It "originates in the relation between lessor and lessee:" Blight's Lessee *vs.* Rochester, *supra;* and it may exist, even though the lessor or lessee be incompetent to contract; Wilson *vs.* James, 79 North Carolina, 379; Helmes *vs.* Stewart, 26 Missouri, 529; Ramines *vs.* Kent, 2 Cal., 558; Danies *vs.* Tearney, 102 U. S., 415.

In view of the relation of tenancy existing between these parties, (a relation running over a period of more than twenty years, and reaffirmed and acknowledged each month by the payment of rent), and the absence of any repudiation of such relation during all those

years, we are firmly of opinion that a court of equity should, in support of this wholesome rule, hold, as we do, that the tenant is estopped from setting up in this bill as a ground for denying the landlord re-entry that the latter has no title to that which the complainant still holds under the lease.

But apart from the estoppel of the tenant, there is another and insuperable objection to this court in this case passing upon
101 the rights which are alleged to have vested in *in* the Atlantic & Ohio Telegraph Company by virtue of its contract of June 20, 1864, with the Pennsylvania Railroad Company. It is manifest that where a court of equity is required to ascertain and determine rights vested by a contract, the parties to such contract, if they have not disposed of their interest thereunder, should be made parties to such litigation: Chicago, etc., R. Co. *vs.* Crane, 113 U. S., 424; Gregory *vs.* Stetson. 133 U. S., 586; West *vs.* Randall, 2 Mason, 181 (Federal Cases No. 17424); Land Company *vs.* Elkins, 20 Fed. Rep., 545; Florence *vs.* Singer, 8 Blatch, 113, (Federal Cases 4885); Williams *vs.* Bankhead, 19 Wallace, 563; 15 Ency. of Pleading and Practice, 611. The Atlantic & Ohio Telegraph Company is not a party to this suit, and being a Pennsylvania corporation, it cannot be made one without ousting jurisdiction. If by its contract of June 20, 1864, a perpetual telegraphic right of way was acquired by that company from the Pennsylvania Railroad Company, no conveyance or assignment thereof by it is shown to have been made. It is true that previous thereto, to-wit, on April 15th, 1864, the Atlantic & Ohio Telegraph Company had made a lease with the Western Union Telegraph Company, wherein it leased "to the party of the second part for the term of ten years, commencing on the first day of April, A. D. 1864, and continue thereafter until terminated by six months' notice, at the option of either party, all their telegraph lines, instruments, property, franchises, with the right to work said lines at offices and the expense of the party of the second part, and enjoy the profits of the same as fully and effectually as heretofore done by the party of the first part, and the party of the second part agreeing to assume all the present indebtedness, liabilities, contracts and obligations of the first part." But this was simply a lease of, and it did not pretend to assign or convey, the property or franchises of the lessor. After ten years it was revocable by either party on six months' no
102 tice. Now whatever equitable rights may exist between the two telegraph companies by reason of the said prior lease or the ownership of stock in the lessor company by the lessee, it has not been shown that the title and reversionary ownership to any interest in land vested by the contract of June 20, 1864, has been conveyed by the Atlantic & Ohio Telegraph Company. Presumptively ownership thereof continues in that corporation. Ownership of its corporate stock does not vest the title to the Atlantic & Ohio Telegraph Company's property in the complainant, and under its lease the latter is a tenant at will revocable on notice of six months. In view of these facts and of the prayers for relief, in the determina-

tion of which the Atlantic & Ohio Telegraph Company is interested, we are of opinion not only that the last named company is a necessary party, but that the railroad company has a right to the presence of such company upon the record that the rights of all parties might be concluded by one decree.

But while the Atlantic and Ohio Telegraph Company is not before us and its rights cannot be determined and decreed, it is proper to here refer to the showing of such alleged rights as bearing on the motion for a preliminary injunction. Where the right to an injunction depends on title, it is generally necessary that the title alleged to justify the issue thereof be set forth with clearness. Whitelegg *vs.* Whitelegg, 1 Bro. Ch. Rep., 57; Davis *vs.* Leo, 6 Vesey, 784, and unless the complainant's right be clear, a court of equity refuses to interfere. Field *vs.* Jackson, 2 Dickens, 599. Without them, passing upon, or deciding as to the validity of the right of way vested in the Atlantic & Ohio Telegraph Company, it would hardly seem the bill sets forth such showing of title in that company as should lead a court of chancery to grant a preliminary injunction and enjoin the respondent from re-entry. Assuming the Atlantic & Ohio Telegraph Company, prior to September 20, 1881, had acquired a permanent telegraphic right of way
103 upon the right of way of the railroad in pursuance of its charter which gave it power to "purchase, receive, have, hold and enjoy, to them, their successors and assigns, such lands, tenements and hereditaments, goods, chattels and all estate, real, personal and mixed, of what kind and quality soever, as may be necessary for the purposes of the company," yet the charter provides further: "and the same from time to time may *sell, convey*, mortgage, *grant, alien, dispose of.*" Having then the power to dispose of what it acquired, it would seem that if it permitted the Pennsylvania Railroad Company to hold adverse possession of such right of way, as that road has done by its tenant, the Western Union Telegraph Company, for more than twenty-one years, the title thereto has been acquired by the latter company. In Pennsylvania the right of possession is acquired by twenty-one years' possession and constitutes a positive title on which one may recover in ejectment: Pederick *vs.* Searle, 5 S & R., 240. It would seem, therefore, that the title alleged is not of such certain character as to warrant the grant of a preliminary injunction.

The landlord's title, as between it and the tenant, being assumed, we next inquire whether the tenant has shown any reason why reentry should be enjoined. The provisions of the contract in relation to length and termination have been set forth above.

On May 14, 1902, the Pennsylvania Railroad Company, in pursuance thereof, through its board of directors, and acting by its president and secretary, gave notice under its seal to the Western Union Telegraph Company as follows: "You are hereby notified to remove within six (6) months from the 1st day of June, 1902, all of your poles, wires and property from the right of way and property of this company and of the other companies named in a certain

agreement between this company and you dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached,) or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and the other companies referred to in good condition and free from the encumbrance of your said poles, wires and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right of way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles and other property, to the satisfaction of the general manager of this company."

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Under this notice the tenant had six months' lee-way from June 1, 1902, to remove, and during such lee-way the monthly rental of $6250., payably by the telegraph company, and the monthly payment of $1250., payable by the railroad for special telegraph service were mutually waived. The monthly payments to be made by the telegraph company of one-half the cash receipts for telegraph service rendered the public not being waived, presumably continued during the six months' lee-way. This notice, under the contract provisions, entitled the landlord to resume possession December 1, 1902. It is, however, contended by the complainant that the notice to quit was waived and that a tenancy under the lease still continues. It will be observed that withdrawal of a notice to quit is not, like a waiver of forfeiture, the act of one party, but requires the assent of both, and when such joint assent is given it creates a new tenancy. The question then whether there was a waiver of a notice to quit is one of intent on the part of both parties to the tenancy. "When a valid notice to quit is given by landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties. If such consent is given there is a new agreement between the parties, and a new tenancy is created which exists only under that new agreement." Wood's Landlord & Tenant, vol. I, section 44, citing Doe *vs.* Milward, 3 M. & W., 328; Taylor *vs.* Wildin, L. R. 3 Ex., 303; Blythe *vs.* Dennett, 13 C. B., 178. See also Fitzpatrick *vs.* Childs, 2 Brewster's Rep., 336; Doe Dem. of Chemney *vs.* Batten, 1 Cowper's Rep., 243. In the present case, the facts alleged to evidence *to* such waiver are undisputed and are found in written communications between the parties, the sufficiency of which can be determined by the court as well now as on final hearing. What are those facts? The notice to quit was, as we have seen, given May 15th, and was addressed to the Western Union Telegraph Company. It was replied to by the president of that company, who addressed his letter to the president of the railroad. Thereafter all correspondence in reference to the lease and the position of the parties with relation thereto, was conducted by these two men. On May

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20th the president of the telegraph company wrote as follows: "I am in receipt of a letter from Lewis Neilson, secretary, dated May 15th, in relation to the termination of the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company, dated September 20, 1881. * * * I understand that for some time prior to my election as president of this company, in March last, negotiations had been in progress between the officers of our respective companies for a renewal of these contracts on terms satisfactory to both parties; and Vice-President Clark has recently turned over to me a draft of proposed new agreement in connection with which I believe we have been awaiting some figures from your company. I shall be glad to take up the matter actively, either here or at Philadelphia, at your convenience."

On the same day the treasurer of the telegraph company,
106 following the usual form and practice evidenced by the vouchers for preceding months, sent to the controller of the railroad a voucher "for payment due May 20, 1902, as per contract, $6250." This payment, it will be observed, covers five days subsequent to the notice to quit. We would not be justified, without convincing proof, in finding this payment for five days (a transaction following the ordinary course of monthly payments between the treasuries), was meant by the heads of these companies, who were conducting these negotiations, to be a waiver of the formal notice of termination which was authorized by a vote of the directorate, and evidenced by the seal of the railroad company. Under the circumstances, we are justified in regarding it as a routine payment, such as was sent and received during a contract running more than twenty years. But payment and acceptance of rent, even after the expiration of a notice to quit—a much stronger case than the present—is not in itself a waiver on the part of the landlord, but is merely evidence to be considered in connection with the circumstances of the case: Fitzpatrick *vs.* Childs, *supra;* Doe or Dem. of Cheney *vs.* Batten, *supra;* Prindle *vs.* Anderson, 19 Wendell, 391. Moreover, there is no proof whatever that the two treasury officers, who made and received this payment had authority to renew a lease of this nature. Since action to terminate was by the board of directors, presumably executive officers would not have authority to renew, but if such authority to renew existed, it is sufficient to say it is not shown. If the payment was known to the president of the telegraph company, who was making answer to the notice to quit, he did not treat it as evidencing an intention to renew a tena-cy under the old contract, for he expressed the desire to actively take up the consideration of the new contract, which had been prepared and which he evidently thought would be adopted. If representing his company in this matter, he did not know of the pay-
ment, and it was simply a routine one, clearly it should
107 be treated as such by the court. The action and reply of the president or the railroad the next day shows the railroad stood on the notice to vacate. He says: "In reply to your favor of the 20th instant, I beg to say that none of the companies named in

your letter desires to renew or extend its contract with the Western Union Telegraph Co. As you are aware, the contract between the Western Union Telegraph Company and the Pennsylvania R. R. Co. terminated, under its terms, on the 20th of September, 1901, and the notices to which you refer, for the removal of the poles within six months, were given in accordance with a provision of the contract. If your company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of your poles, we shall be glad to take up these matters with you at your convenience." It will thus be seen that on May 21st the railroad refused to renew or extend the old contract and stood on the notice to quit. The payment of the five days of rent was treated by the heads of neither of these companies as evidencing a waiver of the notice to quit, or as constituting a renewal of the contract. On June 20, 1902, a similar monthly payment was made and received by the respective officers of the company. There is no evidence that the heads of either of these companies knew o either of these payments. Moreover, it will be observed that they were wholly voluntary. There is no averment that the railroad company paid or the telegraph company demanded the monthly charge provided by the eighth section. After both these payments were made the president of the telegraph company on June 26, 1902, wrote as follows: "I have your favor of May 21st in which you state that none of the companies named in my letter of the 20th desires to renew or extend its contract with the Western Union Telegraph Company, and that the contract between the Western Union Telegraph Company and the Pennsylvania Railroad Company terminated under its terms on the
108 20th of September, 1901, and that the notices which were referred to for the removal of the poles within six months were given in accordance with a provision of the contract, and that if my company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of its poles you will be glad to take up these matters with me at my convenience. Replying thereto, I have to state that this company will be glad to have a conference with your company with a view of adjusting amicably any and all differences that may be found to exist between them, thus avoiding litigation and any possible interference with the duties which this company owes to the Government and the public. I request and urge that you fix a time and place for such a conference, which seems to be the more necessary because your letter appears to be based on a material misunderstanding of the facts in relation to the termination of the contracts and the rights of this company, since some of the contracts referred to in your letter are perpetual in their terms, and run during the life of the parties, and, therefore, cannot be terminated by one party without the consent of the other. As bearing on the subject, I enclose a copy of a letter which I sent and delivered yesterday to the Postal Telegraph Company; also copies of two letters, dated June 24th, to James McCrea, Esq., vice-president, Pittsburgh, Pa., which letters

were sent only after a careful examination of the contracts and the legal rights of the parties by our counsel. It seems proper to add that such a conference as we ask ought to be had before your company concludes any arrangement adverse to this company which would necessitate litigation by this company to enforce its rights. Under the contracts by which the lines of this company on the roads mentioned in your letter of May 21st were brought into existence, the laws of Congress and the constitution and laws of Pennsylvania, this company is advised that it is entitled to maintain and operate its lines of telegraph on the said railroads,
109 subject, only, at most, to make a fair and reasonable compensation to the railway companies for this right, and this company is willing and hereby offers to make such compensation. If your company declines further to contract with this company, I respectfully request a meeting for the purpose of agreeing upon the amount of such compensation, and, if no such agreement can be made, that the matter be submitted to arbitration, your company selecting one arbitrator and this company another, and the two arbitrators thus selected to choose a third, or to have the amount of such compensation determined in any other equitable manner. I shall appreciate an answer at your early convenience, and I venture to express the wish that, in view of the large public and private interests which we represent, you will meet this company in its earnest endeavor to avoid unnecessary and wasteful litigation."

This letter clearly shows that the telegraph company recognized the railroad was standing on the notice to quit and claiming the contract was terminated; that the telegraph company asserted the original contracts, which antedated that of September 29, 1881, were in force in perpetuity and "cannot be terminated by one party without the consent of the other." No mention is made of the payment of rent or any claim made that thereby a new tenancy was created. On the contrary, the ground is taken of rights under the old contracts and that the notice to quit was without effect. The letter in reply, dated July 5, 1902, was as follows: "I beg to acknowledge the receipt of yours of the 26th ultimo. In my letter of the 21st of May I suggested a conference which I thought you might possibly desire to have, for the purpose of making any temporary arrangements you might find necessary under the notice which has been given to your company. This conference, I infer, you do not care to have. A conference concerning the matters you suggest would be useless, as your company asserts rights upon lines of railroads of thecompanies
110 I represent which they cannot concede. Noting your reference to the Postal Telegraph Cable Company, I beg to advise you that a contract has been concluded with that company covering the railroad included in the contract which terminated on September 20th last, under the terms of which the Postal Telegraphic-Cable Company will at once begin to transact a commercial telegraphic business at the stations of the railroad companies, and while the right of your company to do business at such stations has ceased, yet, as we are desirous of causing you as little inconvenience as

possible, we will permit our operators to continue to receive and transmit such messages as the public may desire to send by your lines until September 30th next; the operators to be considered as acting as your agents in that respect, and you to account to the railroad companies for their compensation on a basis equal to that fixed by the former contract. To avoid unnecessary loss to your company, incident to the removal of your poles and wires, we are willing to purchase, at a fair valuation, such of the lines as we can make use of, and if you desire to take up this question, Mr. Charles M. Sheaffer, superintendent of telegraph, will hold himself in readiness to meet a representative of your company to agree upon the price of such lines."

It will thus be seen that the heads of the two companies, who conducted these negotiations did not regard, claim or even suggest that these payments were a waiver of the notice or constituted an agreement for a new tenancy. As the creation of such a relation is a question of mutual intent, and as there was no such mutual intent, we are justified in finding as we do that there was no waiver of the notice to quit. The omission of the railroad company to pay or tender back this money cannot be regarded as evidencing an intention on its part to waive its notice and renew the contract. There is no proof why it has not returned the money, but in view
111 of the provisions of the contract whereby the telegraph company was bound to pay the railroad monthly one-half its cash receipts or public service, and the claim made in the last quoted letter for payment therefor, we are justified in concluding the retention of this voluntarily paid sum was not necessarily a conclusive act, but an equivocal one, and possibly referable to the liquidation of such indebtedness.

After careful examination of all the questions raised and due consideration thereof, we find no ground for the grant of a preliminary injunction. Let orders in accordance with this opinion, dismissing the petition to condemn in one case and refusing an injunction in the other, be drawn, and submitted to the court.

Decree Dismissing Petition for Filing Bond.

And now, January 20th, 1903, this case having come on for hearing sur petition of the Western Union Telegraph Company for the approval and filing of its bond to the Pennsylvania Railroad Company, and for the issuance of process, and the same having been argued by counsel, after due consideration, it is now ordered that said petition be, and it is hereby dismissed, at the cost of petitioner.

By the court.

JOS. BUFFINGTON, *Judge.*

112 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, or some of you, between The Western Union Telegraph Company, plaintiff, and The Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company, as is said and appears by the complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States circuit court of appeals for the third circuit, at the court rooms of said court in the postoffice of the city of Philadelphia, together with this writ, so that you have the same at the said place, before the justice aforesaid, on the first Tuesday of March next, that the record and proceedings aforesaid being inspected, the said justices of the said circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord, one thousand nine hundred and three, and of the Independence of the United States the one hundred and eighteenth.

H. D. GAMBLE,
Clerk of the Circuit Court of the United States for the Western District of Pennsylvania.

The foregoing writ is hereby allowed.

JOS. BUFFINGTON, *Judge.*

113 *Assignments of Error.*

And now comes The Western — Telegraph Company, plaintiff, and says there is error in the record and proceedings in the above entitled case, as follows, to wit:—

1. The court erred in entering an order dismissing the petition of the plaintiff.

2. The court erred in refusing to approve the bond tendered by the plaintiff.

3. The court erred in refusing the plaintiff the right to file its petition in said cause and to require the defendant to make answer thereunder.

4. The court erred in dismissing the petition of the plaintiff and in rendering judgment against plaintiff without any issues of law or of fact having been tendered by the defendant, and without any trial of the issues tendered by the plaintiff in said petition.

5. The court erred in holding that no right to maintain the petition of plaintiff was given by the act of Congress approved July 24, 1866.

6. The court erred in holding that the charter of the Atlantic & Ohio Telegraph Company and the lease by the Atlantic & Ohio Telegraph Company to the Western Union Telegraph Company gave the plaintiff no right to file its petition and maintain its action against the defendant.

7. The court erred in rendering a judgement dismissing the petition of the plaintiff, whereas the court should have entered judgment for the plaintiff.

Wherefore, the Western Union Telegraph Company prays that the judgment rendered herein against it may be set aside and reversed, and that a judgment in its favor, as prayed for in its petition, may be entered.

RUSH TAGGART,
A. M. NEEPER,
Attorney- for Plaintiff in Error.

114 *Bond for Costs.*

Know all men by these presents, that, the Western Union Telegraph Company of New York, New York, a corporation existing under the laws of the State of New York, principal, and the American Surety Company of New York, New York, a corporation existing under the laws of the State of New York, surety, are held and firmly bound unto the above named Pennsylvania Railroad Company, a corporation existing under the laws of the State of Pennsylvania, having its principal office in the city of Philadelphia, State of Pennsylvania, in the sum of five hundred ($500) dollars, to be paid to the said Pennsylvania Railroad Company; for the payment of which well and truly to be made, they do bind themselves, their respective successors and assigns, jointly and severally, firmly by these presents.

Witness their respective common and corporate seals, duly attested by their proper officers, this 17th day of February, A. D. one thousand nine hundred and three.

Whereas, the above bounden Western Union Telegraph Company of New York, New York, has prosecuted a writ of error to the United States circuit — of appeals for the third circuit to reverse the judgment rendered against it in the above entitled suit by the cir-

cuit court of the United States for the western district of Pennsylvania:

Now, therefore, the condition of this obligation is such, that if the above named Western Union Telegraph Company of New York, New York, shall prosecute said writ of error with effect and answer the costs, if it fail to make said writ of error good, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY OF NEW YORK, NEW YORK,
By R. C. CLOWRY, *President.*

Attest: A. R. BREWER, *Secretary.*

115 AMERICAN SURETY COMPANY,
By DAVID B. SICKLES, *Vice President.*

Attest: CORTLANDT S. VAN RENSSELAER, *Attorney.*

And now, to wit, February 19th, 1903, the within bond is approved.

JOS. BUFFINGTON, *Judge.*

STATE OF NEW YORK, } ss:
City of New York, }

On this 18th day of February, A. D. 1903, before me *me* appears David B. Sickles, vice president of the American Surety Company of New York City, New York, with whom I am personally acquainted, who being by me duly sworn, says that he is vice president of the American Surety Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the board of directors of said company; that he signed said instrument as vice president of said company by like authority. The said David B. Sickles further says that he is acquainted with Cortlandt S. Van Rensselaer, and knows him to be the attorney of the American Surety Company; that the signature of the said Cortlandt S. Van Rensselaer, subscribed to the said instrument is the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the order of the said board of directors.

K. J. PEIRCEY,
Notary Public, Kings County, No. 5,

Certificate filed in New York county.

116 STATE OF NEW YORK, } ss:
County of New York, }

On this 17th day of February, A. D. 1903, before me personally appeared Robert C. Clowry, president of the Western Union Telegraph Company, to me known, who being by me duly sworn, did

depose and say that he resides in the city, county and State of New York; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he signed the same as president. And on the same day and year before me personally appeared Abijah R. Brewer, secretary of the said company, to me known, who being duly sworn, did depose and say that he resides in the borough of Glen Ridge, county of Essex, and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he attested the same as secretary.

CHARLOTT VAN BRUNT,
[SEAL.] *Notary Public, Kings County, No.* 4.

Certificate filed in New York county.

117 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear, at a term of the United States circuit court of appeals for the third circuit, to be holden in the city of Philadelphia on the 26th day of February, 1903, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein The Western Union Telegraph Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

JOS. BUFFINGTON, *Judge.*

Dated January 26, 1903.

Served upon Patterson, Sterrett & Acheson, att'ys for Pennsylvania Railroad Company.

H. D. GAMBLE, *Clerk.*

January 26, 1903.

Certificate.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States, for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the

above entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this — day of February A. D. 1903.

[SEAL.] H. D. GAMBLE, *Clerk.*

118 And afterwards to wit: on the 20th day of March, A. D. 1903, this cause being called for argument on the transcript of record from the circuit court of the United States for the district of New Jersey, before Hon. M. W. Acheson, and Hon. George M. Dallas, circuit judges, and Hon. Edward G. Bradford, district judge, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit: on the 19th day of May, A. D. 1903, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania, Defendant in Error. } No. 31.

THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad and Canal Company, Appellants.
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee. } No. 14.

Before Acheson and Dallas, circuit judges, and Bradford, district judge.

DALLAS, *Circuit Judge:*

These two cases are parts of one and the same controversy. They were argued together, and may be disposed of in a single
119 opinion. One of them is before this court upon a writ of error to an order of the circuit court for the western district of Pennsylvania, made January 20, 1903, dismissing a petition by which the Western Union Telegraph Company sought to acquire by condemnation the use of the right of way of the Pennsylvania Railroad Company and its branches, for the telegraph company's lines of telegraph. The other is an appeal from a decree of the circuit court for the district of New Jersey, made upon January 21, 1903,

awarding an injunction restraining the Pennsylvania Railroad Company and others from interfering with the telegraph lines of the Western Union Telegraph Company upon the right of way of the railroad company.

The situation of the parties, and their relation to each other, at the time these proceedings were instituted, may be briefly indicated. On June 20, 1864, the Pennsylvania railroad contracted with the Atlantic & Ohio Telegraph Company for the use by the latter of the right of way of the railroad company for a telegraph line; and the line which was accordingly constructed, was thereafter operated by the Western Union Telegraph Company, as lessee of the Atlantic & Ohio Telegraph Company. On September 20, 1881, however, the Western Union Telegraph Company itself entered into a contract with the Pennsylvania Railroad Company, and under this last mentioned contract, the lines of that telegraph company, over and along the right of way of the railroad company, have since been maintained and operated. This contract, which, by its terms, was to continue in force for twenty years from its date, contained the following provisions:

"Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of
120 said notice, all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: Provided, however, that the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same.

* * * * * * *

Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its limitation."

On May 15, 1902, the railroad company gave a written notice to the telegraph company, as follows:—

"Pennsylvania Railroad Company.

PHILADELPHIA, 15*th May*, 1902.

Mr. Robert C. Clowry, pres't Western Union Tel. Co., New York city.

MY DEAR SIR: In pursuance of action taken by the board of directors of this company on 14th May, 1902, I send the enclosed notice.

Kindly acknowledge receipt, and oblige,

121 Very truly yours,

(Signed) LEWIS NEILSON, *Secretary.*

To the Western Union Telegraph Company:

You are hereby notified to remove within six (6) months from the 1st day of June, 1902, all of your poles, wires and property from the right-of-way and property of this company and of the other companies named in a certain agreement between this company and you dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached), or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and of the other companies referred to in good condition and free from the encumbrance of your said poles, wires, and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right-of-way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles, and other property, to the satisfaction of the general manager of this company.

In witness whereof, the said The Pennsylvania Railroad Company has caused its corporate seal to be hereunto affixed, duly attested by the signature of its proper officers, this fourteenth day of May, anno Domini, 1902.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By A. J. CASSATT, *President.*

Attest:

[SEAL.] (Signed) LEWIS NEILSON, *Secretary.*"

122 On June 20, 1902, the telegraph company sent to the railroad company $6250, "payment due June 20, 1902, as per contract," and this sum the railroad company's comptroller accepted. It does not appear, however, that he either intended or was authorized to waive the notice of May 15, 1902, which, it will be observed, had been ordered by the board of directors of the railroad company, and was given *until* its corporate seal, attested by the signatures of its president and secretary. Moreover, this remittance did

not relate to a time extending beyond that within which the notice had required that the removal should be effected, but covered a period during the running of the notice, when the telegraph company was, under the contract, entitled to continue in occupation without payment of rent. In short, a sum of money which was not demanded nor demandable, was voluntarily paid, not in extension of the term, but upon the erroneous assumption that it was due "as per contract;" and although a minor officer or agent of the railroad company inadvertently or mistakenly accepted this payment, the notice which had been previously given, was not, in our opinion, in any way affected thereby. On June 25, 1902, the Pennsylvania Railroad Company entered into a contract with the Postal Telegraph-Cable Company, granting to that company certain pole facilities upon the railroad company's right of way for fifteen years, and the continued presence of the Western Union Company's lines thereon conflicts with the provisions and purposes of that contract.

The decree in the district of New Jersey was not made upon the merits, but upon the ground that it would result in irreparable injury to no one, and might soon be reviewed upon appeal, whereas an order refusing an injunction would have entailed much loss to the telegraph company, and could not have been appealed from.

123 But now, as to both cases, the substantial rights of the parties are for determination, and to their consideration we accordingly proceed.

The controlling question may be plainly stated. It is this: Has the telegraph company a contractual right to maintain its telegraph lines upon and over the right of way of the railroad company, or can it, independently of contract, acquire such right by condemnation? The first part of this inquiry admits of but one answer. The contract of September 20, 1881, expressly canceled all contracts theretofore made, and declared that any easement or right of way theretofore acquired by the telegraph company was relinquished and abandoned, and that the rights and easements of the telegraph company upon the right of way of the railroad company, should be such only as were granted by that agreement, and should cease with its termination. Hence as the agreement had terminated when, in precise accordance with its terms, the notice to remove within six months from the first day of June, 1902, was given, it is manifest that no right of occupancy, founded thereon, could exist beyond December 1, 1902.

If the asserted right of condemnation exist, it must be because it is conferred either by State law or by act of Congress. As to the law of New Jersey there is no question, the learned counsel of the telegraph company conceding that, as to that State, the right claimed rests upon the act of Congress hereafter referred to, although "the method of making that right effective" is provided by the State statute. But as respects the State of Pennsylvania, it is contended that its law, not only provides the mode of procedure, but also vests in the telegraph company the right to condemn which it asserted in the circuit court for the western district of that State. We cannot sus-

tain this contention, It is based upon the supposition that the railroad company's right of way is subject to appropriation under
124 the authority to the Atlantic and Ohio Telegraph Company, by its charter, "to erect and construct works, edifices, fixtures and structures along any of the roads, highways, streets and waters within this State." But though a railroad company is, no doubt, a "highway," it is quite clear, we think, that it is not a highway to which this grant of authority is applicable. Railroads are, it is true, subject to use for the public benefit, and, in that sense, they are public highways, but they are owned, not by the public, but by corporations, which, so far at least as ownership is concerned, are private corporations. Consequently, it could not have been intended that they should be to any extent taken without compensation, and yet no provision for compensation was made with respect to highways, although for any "land" that should be occupied, it was expressly provided that if the parties could not agree, proceedings might be taken to determine "the price or compensation to be paid * * * for such land taken or used, or the damages done thereto." The distinction thus made is obvious, and the reason for making it is apparent. Nothing was said as to compensation for roads, highways, streets or waters, because those in contemplation were only such as the State itself owned, and the use of which it might therefore grant without exacting any recompense, whereas in delegating the power of eminent domain—to appropriate "lands"—the requirement of compensation was necessarily imposed. But even if the authority given to occupy highways was not manifestly limited—as we think it was—to the public highways of the Commonwealth, it is at least certain that no authority to enter upon the right of way of railroads was plainly and distinctly granted, and it is well settled that the right of eminent domain may be exercised by a corporation, in any case, only when granted in express terms or by necessary implication; and that property held and applied by one corporation for a public use, cannot be appropriated
125 by another for its use, without authority clearly expressed, or which may be implied from the fact (which in this case does not exist) that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. Penna. R. R. Co.'s App., 93 Pa. St., 150; Pittsburgh Junction R. R. Co.'s App., 122 Pa. St., 511; Sharon Ry. Co.'s App., 122 Pa. St., 533; Groff's App., 128 Pa. St., 621; Perry Co. R. R. *v.* N. & S. V. R. R. Co., 150 Pa. St. 193; Phillips *v.* D. W. & P. R. R. Co., 78 Pa. St., 177; Glover *v.* Beston, 14 Gray, 282.

But it is further insisted that the telegraph company having accepted the act of Congress of July 24, 1866, entitled An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes, "the actual appropriation of the railroads of the Pennsylvania Railroad Company to the use of the Western Union Telegraph Company" is thereby effected. That part of the statute which is relied

upon in support of this proposition, is set out in the brief of the telegraph company, as follows:

"That any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph * * * over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by act of Congress * * * provided that such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post roads."

If the question of construction thus presented were an open one, we could not yield our assent to the contention of the learned counsel of the telegraph company with respect to it. But it is not an open one. In Pensacola Co. *v.* Western Union Tel. Co., 96
126 U. S., 1, Mr. Chief Justice Waite, referring to this act of Congress, said: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of the privileges. * * * No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized." The meaning of this language is too plain for question. If the interpretation which it attaches to the statute is to be accepted, that which the telegraph company asks this court to put upon it, is, of course, impossible. But we are asked to disregard the parts of the opinion above quoted, and other of its statements of like import, upon the ground that they "are mere *dicta*." This we decline to do. Careful reading of the whole report of the case, has satisfied us that, in deciding it, the Supreme Court thoroughly considered the statute and the scope of authority conferred by it, and that in saying that "no compulsory proceedings are authorized" by it, the Chief Justice deliberately and advisedly spoke for the other members of the court, as well as for himself. That it settled the law was distinctly declared in Western Union Tel. Co. *v.* Ann Arbor Rd. Co., 178 U. S., 243, where, in an opinion by the the present Chief Justice, it was said:

"It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this tele-
127 graph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide, that, whenever the consent of the owner

is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.' Pensacola Telegraph Company *v.* Western Union Telegraph Company, 96 U. S., 1. In that case Mr. Chief Justice Waite further said: 'No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.' * * * As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

These deliverances are conclusive. They have been so regarded by the circuit court for the northern district of Ohio (Postal Tel. Co. *v.* Cleveland, etc., Co., 94 Fed., 234), and we find nothing in any decision of the Supreme Court which indicates a purpose to repudiate or depart from them. Even if we doubted their correctness, we would feel bound to accept them as authoritative.

Having reached the conclusion that the fundamental position of the telegraph company, in each of these cases, is untenable,
128 no other of the points presented in argument need be considered. From what has been said it results that the order of the circuit court for the western district of Pennsylvania must be affirmed with costs, and the decree of the circuit court for the district of New Jersey must be reversed with costs; and it is so ordered.

Bradford, district judge, concurs in the result.

Filed May 19, 1903.

129 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Plaintiff in Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania. } No. 31.

In error to the circuit court of the United States for the western district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the western district of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the order of the said circuit court in this cause, be, and the same is hereby affirmed with costs.

GEO. M. DALLAS,
Circuit Judge.

Philadelphia, May 20, 1903.

130 *Petition for Writ of Error.*

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

The above-named Western Union Telegraph Company of New York, conceiving itself aggrieved by the final decree, order and judgment entered in the above-entitled cause by the United States circuit court of appeals for the third circuit the — day of June, 1903, prays that a writ of error to said circuit court of appeals be allowed and issued by the Supreme Court of the United States, and that a transcript of the record of proceedings and papers upon which said final decree, order and judgment *was* made, duly authenticated, may be sent to this court; and now at the time of filing this petition for writ of error The Western Union Telegraph Company of New York, plaintiff in error, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in this court.

And your petitioner will ever pray.

HENRY D. ESTRABROOK,
Att'y for Pl'ff in Error.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

Allowed:

131 *Assignment of Errors.*

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

On error to the United States circuit court of appeals for the third circuit.

Afterwards, to wit, on the 17th day of June, in the year of our Lord 1903, at the October term for 1903 of the Supreme Court of

the United States at the Capitol in the city of Washington and District of Columbia, comes the said Western Union Telegraph Company by counsel and says: That in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That, having accepted in writing the provisions and obligations of the act of Congress, July 24, 1866, the said Western Union Telegraph Company had the right to maintain its lines of telegraph along and over the railroads of the defendant in error, The Pennsylvania Railroad Company, upon making just compensation to said railroad company for the use so appropriated and so long as the maintenance of its said telegraph lines should not materially interfere with the ordinary travel on such postroad; and the said circuit court of appeals erred in holding to the contrary.

2. That the usual and proper method of determining the compensation to be paid on the appropriation of property under the power of eminent domain, in the absence of a particular method prescribed by a statute, is by writ *ad quod dammun* and jury trial, and the said circuit court of appeals erred in ruling to the contrary.

132 3. That the said circuit court of appeals erred in affirming the judgment of the circuit court of the United States for the western district of Pennsylvania.

4. That the said circuit court of appeals erred in not reversing the judgment of the said circuit court of the United States for the western district of Pennsylvania.

Wherefore, the said Western Union Telegraph Company prays that the judgment of the said United States circuit court of appeals for the third circuit be reversed.

HENRY D. ESTRABROOK, *Att'y,*
Solicitor for Pl'ff in Error, 195 *Broadway, N. Y.*

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

(Endorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, pl'ff in error, *vs.* The Pennsylvania Railroad Company, def't in error. Assignment of errors. Filed, June 18, 1903.

133 Know all men by these presents, that we, the Western Union Telegraph Company, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the Pennsylvania Railroad Company in the full and just sum of one thousand dollars, to be paid to the said the Pennsylvania Railroad Company — certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of June in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a regular term of the United States circuit court of appeals for the third circuit in a suit depending in said court, between The Western Union Telegraph Company, plaintiff in error and The Pennsylvania Railroad, defendant in error a judgment was rendered against the said The Western Union Telegraph Company, affirming a judgment of the United States circuit court for the western district of Pennsylvania and the said the Western Union Telegraph Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the
134 said The Pennsylvania Railroad Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Western Union Telegraph Company, plaintiff in error, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WESTERN UNION TELEGRAPH CO., [SEAL.]
By R. C. CLOWRY, [SEAL.]
President. [SEAL.]
Attest: A. R. BREWER, *Secretary.* [SEAL.]

AMERICAN SURETY COMPANY OF NEW
[SEAL.] YORK,
By H. B. ZEVELY, *Vice-Pres.*
CORTLANDT S. VAN RENSSELAER, *Attorney.*

Sealed and delivered in the presence of—
C. A. VAN BRUNT.

135 STATE AND COUNTY OF NEW YORK, *ss:*

On this 17th day of June 1903, before me personally appeared H. B. Zevely, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did dispose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said H. B. Zevely, further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S.

Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said H. B. Zevely, vice president.

K. J. PEIRCEY,
[SEAL.] *Notary Public, Kings County, # 5.*

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-president be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and
136 undertakings required or permitted in all *or* proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 16th day of June, 1903.

[SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

Approved June 17, 1903.
R. W. PECKHAM,
Asso. Just. Sup. Ct. U. S.

137 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between The Western Union Telegraph Company plaintiff in error and The Pennsylvania Railroad Company defendant in error a manifest error hath happened, to the great damage of the said The Western Union Telegraph Company plaintiff in error as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

[Endorsed:] In the Supreme Court of the United States. W. U. Tel. Co., pl'ff in error, *vs.* Penn. R. R. Co., def't in error. Writ of error. Original.

138 UNITED STATES OF AMERICA, *ss:*

To The Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit wherein The Western Union Telegraph Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. W. Peckham, associate justice of the Supreme Court of the United States, this seventeenth day of June, in the year of our Lord, one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

I accept service of the foregoing citation on behalf of the defendant in error.

June 30, 1903.

JOB G. JOHNSON.

[Endorsed:] In the Supreme Court of the United States. W. U. Telegraph Co., pl'ff in error, *vs.* Penn. Railroad Co., def't in error. Citation in error. Original.

139 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to one hundred and thirty-eight inclusive to contain a full, true, complete and faithful copy of the original transcript of record and proceedings in the case of The Western Union Telegraph Company, plaintiff in error, *vs.* The Pennsylvania Railroad Company, defendant in error, on file and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixteenth day of July, in the year of our Lord one thousand nine hundred and three and of the Independence of the United States the one hundred and twenty-eighth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

W. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 199.

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

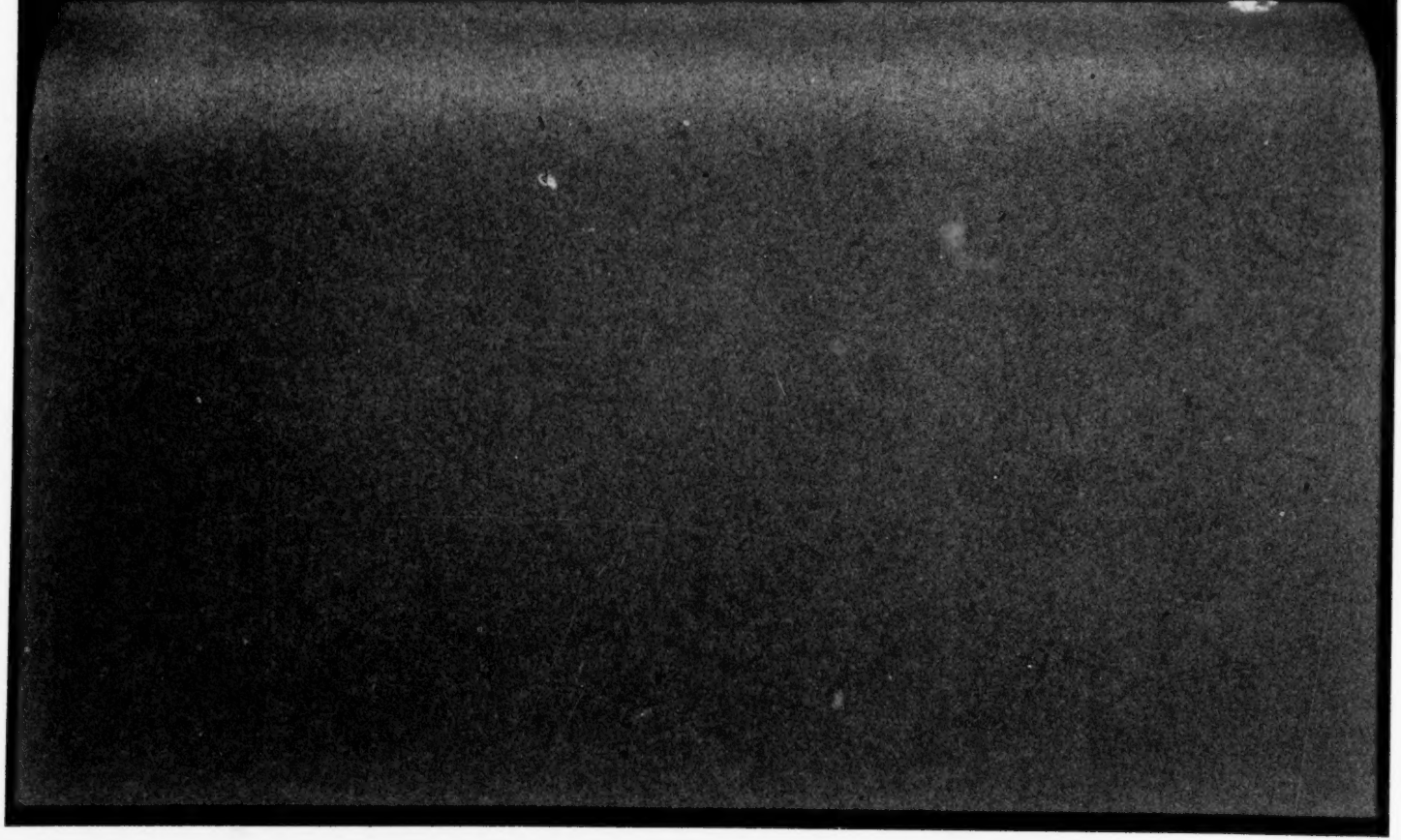
vs.

THE PENNSYLVANIA RAILROAD COMPANY AND THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 5, 1904.
CERTIORARI AND RETURN FILED APRIL 26, 1904.

(19,208.)



(19,256.)

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a *Transcript of Record.*

United States Circuit Court of Appeals, —— Term.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad and Canal Company. } No. —.

On appeal from the circuit court of the United States for the district of New Jersey.

b *Docket Entries.*

1903, October 1.—Transcript of record filed
October 1.—Rush Taggart, Esq., appears for appellant.
1904, February 24.—Brief on behalf of appellant filed.
March 8.—Certified copy of record handed counsel for appellant.
March 26.—Writ of certiorari Supreme Court U. S. brought into office.
April 1.—Stipulation of counsel as to return of writ filed.
April 4.—Amended transcript of record filed.
April 19.—Certified copy of stipulation of counsel with writ issued.
April 21.—Stipulation of counsel filed.

1 In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
against
THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Defendants. } Bill in Equity.

Bill of Complaint.

(Filed November 22, 1902.)

To the honorable the judges of the circuit court of the United States for the district of New Jersey:

The Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, and a citizen and resident of said State, having its principal place of business in

the State of New York and in the southern district thereof, brings this its bill of complaint against the Pennsylvania Railroad Company, a corporation organized under the laws of the State of Pennsylvania and a citizen and resident of that State, having its principal place of business in the city of Philadelphia, but doing business in the State of New Jersey, and the United New Jersey Railroad and Canal Company, a corporation organized under the laws of the State of New Jersey and a citizen and resident of that State, and says:

1. That this case is one wholly arising between citizens of different States, and that the subject matter thereof and the amount in controversy is of the value of more than two thousand dollars, exclusive of interest and costs, and is, also, one arising under the Constitution and laws of the United States, in that your orator, The Western Union Telegraph Company, asserts rights and privileges under acts of Congress and the Constitution and laws of the United States against said defendants.

2. That your orator, The Western Union Telegraph Company, is a telegraph company and a corporation duly organized and existing under an act of the legislature of the State of New York, entitled "An act to provide for the incorporating and regulation of telegraph companies," passed on the 12th day of April, 1848.

2 3. That the United New Jersey Railroad & Canal Company is a corporation duly organized and existing under the laws of the State of New Jersey, and is the owner of a line of railroad extending from Jersey City in the State of New Jersey to the Delaware river at the city of Trenton in said State, with the following branches:

One extending from Princeton Junction in the county of Mercer to the borough of Princeton in said county.

One extending from the city of Rahway in the county of Union to the city of Perth Amboy in the county of Middlesex.

One extending from South Amboy in the county of Middlesex to the city of Camden in the county of Camden.

One extending from the main line in the town of Harrison, Hudson county, to Centre street, Newark, Essex county.

One extending from Monmouth Junction, Middlesex county, to the southerly terminus of the Rocky Hill railroad, near Kingston, Somerset county.

One extending from Millham Junction on the main line in Hamilton township in connection with Belvidere connection in Trenton city.

One extending from junction with Belvidere connection, and Belvidere Delaware R. R. in Trenton city to connection with Bordentown branch.

One extending from junction with the main line in connection with Belvidere and Delaware railroad and Bordentown connection.

One extending from the main line at Monmouth Junction to Jamesburg, Middlesex county.

One extending from Camden & Amboy division at Bordentown, Burlington county, to Trenton, Mercer county.

One extending from the main line at Florence, to Delaware river, Florence foundry, Burlington county, and said railways are within the State of New Jersey and within this district.

4. That the Pennsylvania Railroad Company is a railroad corporation organized and existing under the laws of the State of Pennsylvania, and is the owner of a line of railroad extending from the city of Philadelphia to the city of Pittsburg, in said State, and that within the State of New Jersey the said Pennsylvania Railroad Company is in possession and control of and operating the lines of railroad hereinbefore described as belonging to the United New Jersey Railroad & Canal Company, under a lease or leases for a period of 999 years from the 1st day of July, 1871.

3 That the railroads of the United New Jersey Railroad and Canal Company hereinbefore described were authorized and constructed and are now maintained, operated and controlled under and by virtue of certain public acts of the legislature of the State of New Jersey, as follows:

(1.) An act entitled "An act to incorporate the Delaware and Raritan Canal Company," passed February 4, 1830.

(2.) An act entitled "An act to incorporate the Camden and Amboy Railroad and Transportation Company," passed February 4, 1830.

(3.) An act entitled "An act to incorporate 'The New Jersey Railroad and Transportation Company,'" passed March 7, 1832.

(4.) An act entitled "An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies," passed February 15, 1831.

(5.) An act entitled "A further supplement to the act entitled 'An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies,'" passed March 15, 1837.

(6.) An act entitled "An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia," approved February 27, 1867.

(7.) An act entitled "An act to enable the United Railway and Canal Companies to consolidate their stock and to consolidate or connect with other companies," approved March 17, 1870.

(8.) An act entitled "An act to amend an act entitled 'An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia,'" approved March 14, 1872.

(9.) An act entitled "An act to validate and confirm a certain lease and contract between the companies now known as 'The United New Jersey Railroad and Canal Company' and 'The Pennsylvania Railroad Company,'" approved March 27, 1873.

And your orator further shows that in and by said last-mentioned acts and the several supplements thereto and acts amendatory

thereof, and the general public laws of the State of New Jersey, the said several railroads of the said defendants hereinbefore described were created and made and now are public highways, and as such subject to occupation and use by telegraph companies, and by your orator, under the provisions and conditions of the act of Congress of July 24, 1866, as hereinafter fully set forth.

4 5. That your orator was thus organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of telegraph lines in the State of New York and adjoining States, and has continuously, since that time, been engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extends through all the States and Territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico and through the said land-lines of Mexico with the telegraph lines of the Central and South American Republics and by means of submarine cable with the telegraph systems of foreign countries; that at the present time its said system of telegraph lines operated and controlled by it, as aforesaid, comprises over 192,000 miles of poles and cables, and over 900,000 miles of wire; that upon the said system of telegraph lines your orator has over 23,000 offices, and transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for your orator and exclusive also of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator, which is situated in the city of New York, and the said lines radiate therefrom to all the important cities and commercial centres and to many thousand towns and villages in the United States and North America and through the ocean cables and land-lines above described to all the important commercial centres of this continent and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important part of said system of your orator and connected with its main office as aforesaid in the city of New York and connecting with other lines of telegraph leading to the important commercial centres of the West and Southwest, are lines of telegraph over and along the lines of railway of the defendants connecting Jersey City with Philadelphia, and there connecting with lines reaching to Pittsburg and the West and the city of Washington and the South, and through those lines to connection with lines to Mexico and Central and South American countries.

5 6. That the said lines of telegraph along the said railways of the defendants in the State of New Jersey were originally constructed and owned by the predecessor in title to your orator—

the American Telegraph Company—a corporation of the State of New Jersey, with the consent of or under contracts and arrangements with the railway company then owning the said line of railway, and that the said lines of telegraph were originally constructed more than forty years ago, and that, since the 20th day of September, 1881, the said telegraph lines over and along the right of way of said railroads have been maintained and operated and compensation has been made therefor by your orator under the provisions of a contract between the defendant The Pennsylvania Railroad Company and the Western Union Telegraph Company, a copy of which contract is hereto attached marked "Exhibit 1," and made a part of this bill.

7. That since the making of said contract "Exhibit 1," hereto attached, your orator has, at its own cost and expense, reconstructed all the lines originally constructed by said American Telegraph Company and constructed, at its own cost and expense, additional lines and strung additional wires, and is now the owner of all the lines of telegraph existing over and along and upon the right of way of said defendant railway companies, save and except a line of telegraph belonging to said defendant companies, and used by the defendants for railway purposes in the operation of their railroads. That the said lines of telegraph of your orator have been continuously maintained and operated along and upon the said railways with the consent of the said railway companies, under the contract Exhibit 1, since the 20th of September, 1881; that since the 20th of September, 1901, with the consent of the said railway companies, payments have been made by your orator to the said railway companies, in accordance with the provisions of the said contract, and that said payments were received by the said Pennsylvania Railroad Company, as due under and by virtue of the terms of said contract Exhibit 1, as shown by communication from M. T. Wilbur, treasurer of your orator, to the comptroller of The Pennsylvania Railroad Company, defendant herein, and by the receipts of said Pennsylvania Railroad Company hereto attached and made part hereof as Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19. That the payments shown in Exhibits 16, 17, 18 and 19 were made by your orator and received by the said Pennsylvania Railroad Company after the giving and receipt of the notice of May 14, 1902 next, hereinafter stated as Exhibit 20.

6 8. That on or about the 15th of May, 1902, the defendant The Pennsylvania Railroad Company, acting for and representing the defendants, caused to be transmitted to your orator a notice, dated May 14, 1902, requiring the removal of all the poles, wires and telegraph property of your orator upon the right of way and property of the said lines of railway within six months from the first day of June, 1902, and in default of compliance with the requirements of said notice that the said railroad company would cause said poles and other property to be removed at the expenses

of your orator, a copy of said notice being hereto attached, made part of this bill, and marked " Exhibit 20."

9. That your orator is advised and so avers that by reason of the facts in this bill of complaint set forth, and by reason of the receipt of said payments, as shown in said Exhibits 2 to 19, both inclusive, the said contract of September 20, 1881 (Exhibit 1), was continued in force, and the said contract and all of its terms and provisions are now in full force and effect, and the said defendants have no right, notwithstanding the said notice of date May 14th, 1902, to remove or cause to be removed from the line of the defendant's said railways the poles, wires and telegraph property of your orator at the end of six months from the 1st day of June, 1902.

10. That said lines of telegraph owned by your orator have been maintained and operated along and over said lines of railway of the defendants at all times prior hereto, and at the present time the said lines are so maintained and operated as not to interfere with the ordinary use and operation of said railway and the ordinary travel thereon, being situated near the outer limits of the right of way of said railway and in such manner as not to obstruct, interfere with, delay or endanger the operation of said railways or with the ordinary travel upon said railways, and that as now located, and maintained and operated, said lines can continue to be so maintained and operated as not to interfere with the future operation and maintenance of said railways or the ordinary travel upon said railways, subject only to such slight changes in the location of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way or the shifting of tracks already existing upon said railways, necessitating the removal at some point or points of some of the structures connected with said telegraph lines, which removal or removals your orator is ready at all times to make.

(11.) Your orator further says that the connections of all
7 parts of the system of telegraph lines, owned and operated by your orator at Jersey City, are by means of cables laid with the consent of the defendants and pursuant to law and acts of Congress in that behalf provided under the waters of the Hudson river and navigable rivers of the United States and landing upon the rights of way and property of said railway companies used in connection with the operation of their said railroads.

(12.) Your orator says further that, upon the receipt of the said notice, Exhibit 20, attached hereto, through its president, it communicated with the said defendant The Pennsylvania Railroad Company, as shown by letter of May 20th, 1902, copy of which is hereto attached, made part hereof, marked " Exhibit 21."

That in reply to your orator's communication, Exhibit 21, your orator received a communication from the said defendant Pennsylvania Railroad Company, dated the 21st of May, 1902, copy of which is hereto attached, made part hereof and marked " Exhibit 22."

That, under date of June 26th, 1902, your orator caused a reply to be transmitted to the said communication, which reply is marked

Exhibit 23, asking a conference of the said defendant Pennsylvania Railroad Company for the purpose of adjusting and agreeing upon the compensation to which the defendant's company would be entitled for the use by your orator for its said lines of telegraph of your orator over and along and upon the right of way of the said railroad companies, a copy of which communication is hereto attached, made part hereof, and marked "Exhibit 23."

That in reply to said communication, Exhibit 23, under date of July 5, 1902, your orator received a communication signed by the president of said defendant companies, a copy of which is hereto attached, made part hereof and marked "Exhibit 24."

That said defendant Pennsylvania Railroad Company has refused to negotiate with your orator for the continued use and occupation of said railroads, and has refused to treat with your orator as to the compensation to be paid by your orator for telegraph uses under and pursuant to the said acts of Congress.

(13.) Your orator further shows that the defendant The Pennsylvania Railroad Company in giving to your orator the said notice to remove its poles, wires and telegraph fixtures from the premises of the said defendants and in refusing to negotiate for the use of its said railways has not been impelled thereto by any compulsion or necessity to use the space occupied by your orator's said tele-
8 graph lines for railroad purposes, for as your orator has fully shown and set forth and here alleges said telegraph lines do not and will not interfere with the ordinary travel and use of said railways, but your orator is advised and avers the fact to be that the purpose of the said defendants is, upon the removal of said telegraph lines of your orator, to place or allow to be placed upon said lines of railway telegraph lines to be owned or used by another telegraph company in the same or substantially the same location now occupied by your orator's lines, and to be used in the same or substantially the same manner as your orator now uses its said lines of telegraph on said railroads.

14. Your orator says that the Congress of the United States passed an act, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes."

That the first section of said act is as follows:

"Any telegraph company now organized or which may hereafter be organized under the laws of any State shall have the right to construct, maintain and operate telegraph lines through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

The second section of said act is as follows:

"That telegraphic communication between the several departments of the Government and their officers and agents, shall, in their transmission over the lines of any such telegraph companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

Section 3 of said act is as follows:

That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person; provided, however, that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military or other
9 purposes, purchase all the telegraph lines, property and effects of any or all of said companies, at an appraised value to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

Section 4 of said act is as follows:

That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

15. Your orator further says that, complying with the provisions of the said act of Congress, it did, on or about the 8th day of June, 1867, duly file its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of said act (a copy of which is hereto annexed, marked "Exhibit 25," and made part of this bill of complaint), and thereupon your orator became entitled to all the rights and privileges conferred by said act and burdened with all the obligations imposed thereby, and that it has continuously, since the filing of its said written acceptance, as aforesaid, fully performed, and at the present time is fully performing, all the obligations and requirements of said act, and has carried upon its lines of telegraph, messages for the Government of the United States and for the several departments thereof, giving the same priority over all other business and at rates annually fixed by the Postmaster-General, which rates have been much less than the ordinary reasonable rates charged to and paid by individuals and the public for the transmission of like messages and communications.

16. Your orator further says that, by an act of Congress approved June 10, 1872, entitled "An act making appropriations for sundry civil expenses of the Government, for the fiscal year ending June 30, 1873, and for other purposes," the following was among other things enacted:

"Provided that the Secretary of War be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit

of agricultural and commercial interests; and provided that no part of this appropriation nor of any appropriation for the several
10 departments of the Government shall be paid to any telegraph company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents or employés, under the provisions of the second section of chapter 230 of the Statutes of the United States for the year 1866, and at rates of compensation therefor to be established by the Postmaster-General; provided also that, whenever any telegraph company shall have filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July 24, 1866, entitled 'An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' if such company, its agents or employés shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act or by the joint resolution approved the 9th day of February, 1870, 'to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of the approach and force of storms,' such telegraph company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law in any district court of the United States."

17. Your orator avers that, in compliance with the said last-named act, it has carried for the Government of the United States over lines situated over and along the lines of railway of the defendant companies, and upon its other telegraph lines connected therewith, at all times since the passage of said act, at rates far below the reasonable rates charged to and paid by individuals or to the public for similar services, communications relating to the meteorological and signal service from the various stations maintained by the Government of the United States throughout the interior of the continent and along the seaboard, such communications being especially difficult of transmission from the fact that they are for the most part written in cipher, for the purpose of saving expense to the Government of the United States and many words are indicated by a single arbitrary word or character; but that, nevertheless, even at the reduced rates at which your orator carries such communications the charges therefor amount to many thousands of dollars annually.

11 18. Your orator further says that the Congress of the United States, by an act approved June 18, 1872, enacted that all railroads or parts of railroads which were then or might thereafter be in operation, and all letter-carriers' routes established in any city or town for the collection and delivery of mail matter should be post routes, and thereafter by an act approved March 1, 1884, all

public roads and highways, while kept up and maintained as such, were declared to be post roads.

19. That the said acts of Congress apply to the railroads of the defendants, herein mentioned and described, and the said railroads are post roads of the United States duly established by act of Congress in that behalf provided, and are also public roads and highways under said acts of Congress and the said laws of New Jersey relating to the defendant railway companies. That your orator, The Western Union Telegraph Company, having duly filed its written acceptance with the Postmaster-General of the restrictions and obligations of the said act of July 24, 1866, and fully complied with all the restrictions, obligations, duties and requirements of said acts of Congress above mentioned, has the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendants herein mentioned and described so as not to interfere with the ordinary travel thereon, and the plaintiff is ready and willing and hereby offers to make to the defendants, and each of them, a just compensation for the use by your orator of the roadway or right of way of the defendant companies for your orator's telegraph lines under and pursuant to said acts of Congress, over and along the said railroads of the defendants.

20. That the said grant by the United States in and by the aforesaid acts of Congress of the right to construct, operate and maintain the telegraph lines of the plaintiff on the railroads of the defendants was a grant made upon a full, valuable and continuing consideration paid and rendered by your orator to the United States, which consideration was the agreement of the plaintiff evidenced by your orator's written acceptance of the act of July 24, 1866, duly filed with the Postmaster-General, of the restrictions and obligation- of the said act, as hereinbefore set forth, and the full and continuous performance by your orator of all of the obligations and duties created and imposed by said acts of Congress. That your orator has since said acceptance of said act performed all the obligations and duties required by said acts and by law, and your orator has ever since the date of filing of said acceptance given, and is still giving, to
12 the United States, and to the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of your orator, situated over and along the railroads of the defendants, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by your orator for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered by your orator to the Government. Your orator has accepted, among others, the provisions of the said act of Congress of July 24, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said act of Congress. Your orator states that by reason of the premises, its acceptance of the said act of Congress, the

construction and maintenance of its telegraph lines thereunder, and the continued performance by your orator of the requirements of the said acts of Congress, the right granted by the said act of July 24, 1866, to your orator to construct, maintain and operate its lines of telegraph over and along the railroads of the said defendants became vested, and the said grant is in full force and effect, and your orator avers, that its right to construct, maintain and operate its said lines of telegraph over and along the railroads, and right of way of the defendant companies is complete, your orator being under an obligation or liability only to make fair and reasonable compensation to the defendants for the value of the use by your orator of the said right of way or railways of the defendants in the manner and under the restrictions of the said acts of Congress.

21. That the plaintiff, on June 8, 1867, duly accepted as aforesaid the said act of July 24, 1866, and acting thereon immediately entered upon the performance and has ever since continued to perform all of its duties and obligations thereunder to the United States and the public and the plaintiff was in possession and enjoyment of its telegraph lines over and along said defendants' railroads herein mentioned and described and of the rights granted and conferred upon it by said act of July 24, 1866, long before and at the time the Pennsylvania Railroad Company became the lessee of said railroads or acquired any interest therein or use or control thereof, of all of which the defendants then and there had notice; and the plaintiff is advised and now avers that the rights of the defendants in said railroads are subject to the rights of the plaintiffs under said acts of Congress and the laws of New Jersey and in particular the
13 plaintiff avers that the said lease of said railroads to The Pennsylvania Railroad Company, defendant herein, and any rights acquired by said Pennsylvania Railroad Company in or to said railroads or the use, possession or control thereof are subject to the rights of the plaintiff granted and conferred upon it by the said act of Congress of July 24, 1866, and acquired by the plaintiff by its acceptance of said act and its performance of all the obligations and requirements of said acts of Congress.

22. Your orator further says that prior to the expiration of the period named in said contract of Sept. 20, 1881, your orator entered into negotiations with the officers of said Pennsylvania Railroad Company respecting an arrangement as to the continuance of the maintenance and operation of the telegraph lines of your orator over and along the lines of the railways controlled and operated by the said railroad company, and that said negotiations proceeded so far that substantially all the terms and conditions of a contract were agreed upon and reduced to writing, there remaining only a few details to be ascertained in order to embody in the said contract a complete agreement respecting the continued maintenance and operation of your orator's said telegraph lines; and that your orator, relying upon the promises and representations of said defendant that such an arrangement would be made, took no further steps to

enforce its right to construct, maintain and operate its said lines over and along the railways of defendant until the receipt of said notice from the said defendant The Pennsylvania Railroad Company, dated the 14th day of May, 1902 (Exhibit 20), hereto attached and hereinbefore set forth; that following the receipt of said notice your orator sought to treat with the said defendant The Pennsylvania Railroad Company as to the amount of compensation to be paid by your orator for the use of the right of way or roadway of the defendants whereon to construct, maintain and operate the telegraph lines of your orator over and along the said right of way of said railroads, whereby your orator's lines of telegraph might connect with the lines beyond the defendants' lines of railway and form continuous lines for the transmission of intelligence to other States and to foreign countries for the public and the Government of the United States; but the said defendant refused wholly to treat with your orator as to the amount of compensation to be thus paid.

23. Your orator is informed and believes that the said defendants will insist that your orator has no right or privilege of constructing, maintaining and operating telegraph lines over and along the
14 defendants' lines of railway, except as such right may be conferred upon your orator by a contract with or by the permission of the defendants; that said defendants insist that the said acts of Congress, although accepted and performed by your orator as herein shown, confer no right or privilege upon your orator to construct, maintain and operate its telegraph lines over and along the defendants' said railways, except as the said defendants may consent thereto and upon the terms and conditions fixed by the said defendants, and that the said contract of September 20, 1881, fixed for the period named in the said contract the terms and conditions upon which alone your orator had the right to construct, maintain and operate telegraph lines over and along the said defendants' railways, and that upon the termination of the period named in said contract the right of your orator to construct, maintain, and operate its lines of telegraph over and along the defendants' said lines of railway wholly ceased and determined; and that the sole right of your orator in or to said telegraph lines is the right of removal of the poles, wires and fixtures connected therewith, according to the terms and conditions prescribed in the said contract of September 20, 1881; but your orator insists that in and by the said acts of Congress hereinbefore set forth their acceptance and performance by your orator of the duties and obligations created and imposed by said acts, as in this bill of complaint set forth, there was granted to your orator and your orator has the right to construct, maintain and operate its telegraph lines over and along the defendants' said lines of railway, as in said acts provided, subject only to the condition that your orator should pay to the said defendants a reasonable compensation for the use of the right of way or roadway of the defendants occupied by your orator's telegraph lines. Your orator shows that the right thus conferred in and by the said acts of

Congress upon your orator, your orator has never waived nor relinquished and that in accepting the provisions of the said acts of Congress it entered into obligations and undertakings with the Government of the United States which would effectually preclude it from waiving or relinquishing, and your orator avers that it has never waived or undertaken to waive or relinquish the same.

24. Your orator alleges that said defendants deny and repudiate any right on the part of your orator, even upon tender or payment to the defendants of just compensation therefor, to construct or to continue to maintain and operate its telegraph lines or any telegraph lines over and along the defendants' said lines of railway, notwithstanding the provisions and conditions of the said act of Congress of July 24, 1866, and the laws of the State of New Jersey above mentioned. Your orator avers, upon ascertaining the fact that the said defendant, The Pennsylvania Railroad Company, was wholly unwilling to treat with your orator as to the amount of such compensation and wholly denied as aforesaid the rights of your orator, that thereupon your orator, in aid of its rights and equities as shown in this bill of complaint, duly filed its petition and brought its action in this court, upon the law side thereof, against the defendants in this suit, to have ascertained and determined the amount of compensation to which the defendants herein would be entitled from your orator, for the use of the right of way of the defendants' said railroads in the State of New Jersey, whereon your orator might construct, maintain and operate its said lines of telegraph, and that upon the payment of said sum thus ascertained your orator would have as against the defendants the right to construct, maintain and operate telegraph lines along and upon the right of way or roadway of the railways of the defendants herein, but subject always to the conditions named in the said act of Congress of July 24, 1866, that the same should not interfere with the ordinary travel upon said railways, nor with the operation, use, possession and control of said railways by the said defendant railway companies. That a copy of your orator's petition in the said action as filed is hereto attached marked "Exhibit 26" and made part of this your orator's bill of complaint; that in the said action thus brought summons has been issued and service made or will speedily be made upon the defendants herein, and your orator expects in due time as soon as the said action can be heard, that the court will order and adjudge the amount of compensation upon the payment of which as thus adjudged by the said court, your orator will be entitled to continue to construct and to maintain and operate telegraph lines along and over the said lines of railway, owned and controlled by the said railway companies under and subject to the conditions and provisions of said act of Congress of July 24, 1866.

25. Your orator further states that it stands ready and is able and willing and hereby offers to pay to the said defendant railway companies such just and reasonable compensation as may be decreed by this court under this its bill of complaint or in the said action

filed on the law side of this court, for the use of the right of way of the defendants' railroads on which to construct, maintain, and
16 operate your orator's telegraph lines over and along the right of way of the said railway companies, as provided in the aforesaid act of Congress of July 24, 1866, and under the terms, conditions, and restrictions thereof, and is willing and hereby offers to furnish such security for the payment of such sum as may be decreed by this court in this cause or that may be adjudged in the said action upon the law side of this court, or as the court may otherwise ascertain and determine and herewith tenders such security upon such terms and conditions as this court may fix.

26. Your orator says further that said lines constitute some of the main lines of communication for the transmission of telegraphic messages between the city of New York and foreign countries and the larger cities of the West and Southwest and that the defendant The Pennsylvania Railroad Company is threatening at the termination of the six months named in its notice, dated May 14, 1902, to wit, on the first day of December, 1902, to sever the lines of telegraph from their connection with the other lines of telegraph owned and operated by your orator, and thus cut off and destroy the same for the purposes of telegraphic communication and thereby deprive a large number of the public in the United States and foreign countries of the means of telegraphic communication now enjoyed by them, and also to cripple and deprive the several departments of the Government of the United States of telegraphic facilities on said lines of railway now enjoyed by them, and the said defendants unless restrained by this order of the court will carry such threats into execution.

27. Your orator further says that the cutting down of the said poles and the removal of the said wires and the severing of the connections with the said cables, as threatened by the defendant, The Pennsylvania Railroad Company, would inflict irreparable injury upon your orator and would practically destroy the entire value of all of the telegraphic properties of your orator now constructed, maintained and operated along and upon the right of way of the defendant railway companies as hereinbefore set forth; that the value of said poles when taken down for removal would be but a small portion of their value as working parts of your orator's telegraphic system, and that the wires thereon would be of comparatively small value when taken down and removed from connection with the said poles; that said properties are of such character that the act of removal would largely destroy their value, and that if the said Pennsylvania Railroad Company, defendant herein, is allowed to carry
17 out its threats as aforesaid, it will be the practical destruction of so much of your orator's telegraphic system, comprising a large number of wires upon which are now being carried most important business for the public and for the Government of the United States; that said telegraph lines along and upon the right of way of the railways of the said defendant company do not interfere with the

ordinary operation of said railways, and will not so interfere, and the continuance of the said lines there will be of but slight detriment, in any aspect of the situation, to the said defendants or either of them.

28. Your orator further avers that there is no other company equipped with the facilities to transmit for the public the business which is now being transmitted over the lines situated along and over the right of way of the defendant railway companies, and that if the public and the Government of the United States were deprived of the facilities afforded by the said lines along and over the defendant's railways, a long period of time must elapse before facilities to take their place can be furnished by your orator, or by any other company engaged in the business of telegraphing.

29. Your orator says further that it is diligently prosecuting said action on the law side of this court for the ascertainment of the amount of compensation to the said railway companies defendant herein for the right to the use of said railroads to maintain and operate its telegraph line along and over the lines of said railways as prescribed in said act of Congress of July 24th, 1866; and that it will continue to prosecute the same to a final determination as rapidly as the business in said court will permit the said cause to be heard and determined and without any unnecessary delay.

30. Your orator avers that such forcible removal of your orator's telegraph lines by the defendant as threatened is contrary to the intent and purposes of said acts of Congress, and would work great, irreparable and lasting damage and injury to your orator, to the public and to the Government of the United States and which could not be compensated for in money; and that the value of the use of the right of way of the defendants by your orator is of comparatively small value, works no substantial damage or injury to the defendants and can be fully compensated for in money.

31. Forasmuch, therefore, as your orator can have no adequate relief except in this court and to the end that the defendants
18 may, if they can, show why your orator should not have the relief hereby prayed make full disclosure and discovery of all the matters aforesaid according to the best of their knowledge and belief and full, true and perfect answer make to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived, your orator prays that this court ascertain, order, adjudge and decree the amount of compensation to be paid by your orator to the defendants, as their rights may severally appear, for the construction, maintenance and operation of your orator's telegraph lines over and along the right of way of the defendant's said railroads under the terms, provisions and restrictions of said acts of Congress hereinbefore mentioned, or if this court shall order and determine, that the amount of such compensation to the defendants shall be such amount as shall be determined or adjudged in the said action at law, that upon due payment of such compensation by your orator to the defendants, this court will order, adjudge

and decree that your orator is entitled to a perpetual injunction against the defendants herein and each of them, restraining them and each of them from in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendants under and subject to the provisions and restrictions of the said act of Congress of July 24th, 1866, and meanwhile and until the final decree of this court that a temporary injunction be issued against the defendants prohibiting and restraining them and each of them from in any manner interfering with the use and operation of the telegraph lines of your orator upon the said roadway and right of way of the defendants pending the determination of the said action at law, or until the further order of this court in the premises. And for such other and further relief as the case may require and to your honors may seem just.

May it please your honors to grant unto your orators not only the writ of subpœna of the United States of America to be directed to the defendants The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company commanding them and each of them by a certain day and under a certain penalty to be and appear before your honors in this honorable court then and there to answer all and singular the premises and to stand and abide and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience; but also the United States writ of injunction, restraining them and each of them, their servants, agents and employees as aforesaid.

19 This bill of complaint is filed under the corporate seal of the complainant.

[SEAL.] ROBERT C. CLOWRY, *President.*

Attest: A. R. BREWER, *Secretary.*

RUSH TAGGART,
Solicitors for Complainant.
JOHN F. DILLON,
RICHARD VLIET LINDABURY,
Of Counsel.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Robert C. Clowry, being duly sworn, says he is president of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ROBERT C. CLOWRY.

Sworn to before me this 15th day of November, 1902.

[L. S.] CHARLOTTE A. VAN BRUNT,
Notary Public, Kings County, No. 4.

Certificate filed in New York county.

EXHIBIT 1.

This agreement, made, the twentieth day of September, anno Domini one thousand eight hundred and eighty-one (1881), between the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, hereinafter for brevity designated as the railroad company, and the Western Union Telegraph Company, a corporation of the State of New York, hereinafter for brevity designated as the telegraph company, witnesseth:

20 First. Said railroad company hereby grants, to the extent of its corporate power so to do, to the said telegraph company, a right to place, maintain and use upon the line of the right of way of the Pennsylvania railroad, and of the railroads owned, operated, or leased by it, or in which it is otherwise interested, as enumerated in the schedule hereto attached, marked "A," and made part of this agreement, a single line of telegraph poles, except where two are hereinafter authorized, with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company, or such other officer as the railroad company may designate for that purpose; *provided*, That the location of any of the telegraph company's poles shall, from time to time, be changed from one point to another on the railroad right of way at the expense of the telegraph company, in such manner as the general manager, or other proper officer of the railroad company may direct, so as not to interfere with the operations of the railroad; *provided, however*, That the telegraph company shall have the right to maintain two lines of poles and such number of wires as it may deem necessary, on the south side of the main line of the railroad company's railroad between Jersey City and West Philadelphia, it being understood that the railroad company may require and permit the telegraph company either to put its wires under the railroad right of way, or to remove them from said right of way through the various cities, towns or villages, or any of them, between West Philadelphia and Jersey City, including both of those cities, the telegraph company reserving the right to elect whether it shall put its wires under the railroad right of way or transfer them to other routes. The telegraph company shall have the right to maintain, renew and repair its underground line now running through the property of the railroad company in Jersey City. And should additional corporate action upon the part of any of the corporations controlling the roads

named in "Schedule A," hereto attached, be necessary to cover the lines therein named, the railroad company will also endeavor to procure such corporate action upon the part of such corporations.

Second. Said railroad company also grants to said telegraph company the right to lay down and maintain submarine cables, and to connect the same on the shores of any stream with the land poles or wires of the telegraph company, on the rights of way and grounds of the railroad company, in such locality, and in such man-
21 ner, under the direction of the general manager aforesaid, or such other officer as the railroad company may designate for that purpose, as shall not interfere with the operations of the railroad.

Third. Said railroad company reserves to itself the option of determining whether the telegraph company may place a wire or wires, in addition to those provided for in the seventh clause hereof, upon the poles of the railroad company, upon any or all of the lines embraced in said schedule, the telegraph company agreeing that if such privilege be granted to and availed of by it, it will pay to the railroad company for the same, four dollars per mile per annum for each wire placed in pursuance thereof.

Fourth. The railroad company agrees to transport to and from regular stations, free of charge, over said lines of railroad embraced in this contract, the officers and employees of the telegraph company when engaged in building and repairing, equipping, and operating the telegraph lines and wires hereby authorized upon said railroads, and also to transport free of charge to regular stations over said railroads the material to be used in the building or repairing, equipping or operating of said telegraph lines and wires herein authorized to be constructed, maintained, or operated on the railroads named in Schedule A; the telegraph company hereby agreeing that it will hold harmless and indemnify the said railroad company against all responsibility for damages, costs, or expenses that may be incurred or recovered for any injury by accident or otherwise to any person or property transported free under the terms of this agreement.

Fifth. The railroad company agrees that it will not hereafter grant the right to any other party or telegraph company to erect, maintain, or use poles or wires upon the right of way, or the buildings, bridges, or other structures or fixtures connected with the right of way of any of the railroads embraced in this agreement, unless such other party or telegraph company shall pay annually for such right in money an amount equal to the total annual money compensation herein agreed to be paid by the telegraph company, to wit:

If under the terms of this agreement, the railroad company shall hereafter grant to any other party or telegraph company the right to erect poles with wires thereon, the railroad company shall have the right, anything in this agreement contained to the contrary not-

withstanding, to make the same terms, or terms which in the
22 opinion of the railroad company's board of directors will be
equally favorable, with such party or telegraph company, as to receiving and transmitting messages for the public, as are made with the Western Union Telegraph Company in the ninth article of this agreement. The provisions of this section not to apply to underground lines of wire.

Sixth. The telegraph company agrees to pay annually to the railroad company during the continuance of this agreement for the privileges granted in the first and second clauses hereof, whether the same be availed of or not, the sum of $75,000 in monthly installments of $6,250 each, upon the twentieth day of each month, the year to begin on the twentieth day of September, 1881, and the first payment to be made on the twentieth day of October, 1881, and also to sell, transfer and deliver over to the railroad company as an additional compensation for the privileges hereby granted, the entire line of poles as it now exists on the north side of the railroad company's railroad, between Jersey City and Kensington (except through Marion, East Newark, Newark and Rahway), and also six of the best number eight or nine gauge continuous wires now upon said poles, and on the poles of the telegraph company through said excepted places, and two additional like wires upon the poles of said telegraph company on the south side of said road from Philadelphia to Jersey City, the existing poles and wires so to be delivered to the railroad company, being of an estimated value of forty-one thousand dollars ($41,000), with the agreement that any wires in excess of the six wires upon the poles on the north side of the said road so to be transferred to the railroad company shall remain thereon until they can be removed by the telegraph company, which shall not be later than one year from date; *provided, however*, That the telegraph company may leave and continue on said poles two wires, as provided for in section seventh.

Seventh. The telegraph company hereby grants the right to the railroad company to place two of its wires upon the poles and in the cable houses of the telegraph company without charge, and also the right to place, from time to time, additional wires necessary for the business of the railroad company upon any of the poles and in the cable houses of the telegraph company on said lines of railroad, upon the payment by the railroad company of four dollars per mile per annum for each of such additional wires; and the railroad company hereby grants the right to the telegraph company to place two
of its wires upon the poles and in the cable houses of the
23 railroad company without charge. The telegraph company
will furnish at cost, or the railroad company may furnish at its own expense, cable conductors for connection with the railroad company's wires.

Eighth. The telegraph company agrees to transmit over its wires for the railroad company, during the continuance of this agreement, with the same promptness, efficiency, and dispatch as it does for any

other party, for the sum of fifteen thousand dollars ($15,000) per annum, payable in equal monthly installments of one thousand two hundred and fifty dollars ($1,250) each, all messages pertaining to the business of said railroad company, or of any of the companies whose lines are included in Schedule A and covered by this agreement, or any message relating to its business sent by an officer of either company as embraced in said schedule, to and from all points on the lines of said telegraph company throughout the United States and the British provinces, now erected or which may hereafter be erected, as well as upon any lines which the said telegraph company may now or hereafter during the continuance of this agreement secure the use of by purchase, lease, or otherwise in the United States or the British provinces.

The transmission of messages for the railroad company or any of the companies whose lines are included in Schedule A, and the transportation of employés of the telegraph company, as hereinbefore provided, shall be authorized by franks and passes to be issued by each party to the other, upon application of a properly authorized officer of the party requiring such service.

Ninth. At all telegraph stations of the railroad company, upon the lines of said railroads, the railroad company shall, at its option, have the right to receive, transmit, and deliver messages for the public, and if such messages be sent over the telegraph company's wires—the right so to forward them being hereby given to the railroad company—it shall be at the tariff rates of the telegraph company. The operators of the railroad company receiving, forwarding, and delivering messages so interchanged between the telegraph company's and the railroad company's lines, shall be considered as acting as the agents of the telegraph company, and such operators shall remit all receipts for such messages to the telegraph company, which company shall furnish to the railroad company a monthly statement thereof, and the telegraph company agrees to pay monthly to the railroad company one-half of the cash receipts for such service, after deducting all tolls on ocean cable messages and tolls belonging to lines of other companies paid on such
24 messages, which shall be retained in full by the telegraph company. If the railroad company grant the right to any other telegraph company to have an office or offices in any of the depots or buildings of the railroad company, the same privilege in the same depot or building shall be granted to the Western Union Telegraph Company on as favorable terms and with as favorable location as shall be granted to said other company.

Tenth. The railroad company shall have the right to the free use of any telegraphic patent rights, or new discoveries, or inventions that the telegraphic company now owns, uses or controls in its general telegraph business, or which it may hereafter own, use, or control as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

Eleventh. The telegraph company agrees that, as a part of the service for which it is to receive the allowance of fifteen thousand dollars ($15,000) under article eighth of this agreement, it will receive and transmit cable dispatches on the business of any of said railroad companies to Europe and other foreign countries, aggregating at current rates the sum of one thousand dollars ($1,000) per annum, the railroad company agreeing to pay any excess on cable messages over that amount in each year.

Twelfth. Neither the general terms of this agreement, nor any stipulation contained herein, shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the railroad company, or any other company whose action it may procure, and in favor of the telegraph company, as against the owner of the fee simple of the land over which the railroad or other company has the right of way, nor as against the exercise of the power of eminent domain upon the part of any other company possessing it by grant from the Commonwealth or State creating such corporation; *and it is further agreed*, That if anything herein contracted to be done, or not to be done, shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of an excess or defect of corporate or legal authority in so doing.

Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their successors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing: *Provided*, That if before the expiration of said twenty years the railroad company shall, from any cause, cease to own, operate or control any or either of the railroads enumerated in Schedule A, without having procured the corporate assent to this agreement of the proprietary corporation, this agreement shall become inoperative as to such railroad or railroads after the railroad company shall cease to own, operate or control the same, and in such event, the annual payment provided for in the sixth section hereof shall be reduced in such proportion not exceeding the mileage of the railroad or railroads so ceased to be owned, operated or controlled, as may be agreed upon between the parties hereto; and in case they cannot agree, such proportion as may be fixed by the arbitrators as per article eighteenth of this agreement.

Fourteenth. It is a condition of this agreement that the railroad company is not to be responsible for, and the telegraph company hereby covenants and agrees to save the railroad company harmless, and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company, while being carried free over any of said railroads under this agreement; and the telegraph company shall not be responsible for, and the railroad company agrees to

indemnify and save harmless the telegraph company against any loss or damages of any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the railroad company under this agreement.

The telegraph company hereby assumes all responsibility for damages resulting from errors, failures, delays, or other defaults or mishaps in the transmission or delivery of messages occasioned by the fault of persons employed directly by it; and the railroad company hereby agrees to pay one-fourth (¼) the amount of any damages, costs or legal expenses which may be recovered against or incurred by the telegraph company on account of any errors, failures, delays, or other defaults or mishaps in the receipt, transmission, or delivery of messages, occasioned by the fault of persons employed by the railroad company, and acting as agents of the telegraph company, in the transaction of commercial or public telegraph business, the telegraph company agreeing to pay the remaining three-fourths (¾).

Fifteenth. If any monthly payment herein provided for be not made with[illegible] sixty days after it shall have become due, and shall have been demanded by written notice, delivered, to
26 the treasurer, or an executive officer of the party in default, or if any other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfillment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due or for damages for nonfulfillment of such covenant or of any other covenant.

Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time hereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: *Provided, however*, That the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same.

Seventeenth. All and all manner of contracts, engagements, or arrangements w[illegible]atsoever, hitherto made between the said railroad company or [illegible] of the companies named in Schedule A hereto attached, or a[illegible] company merged or consolidated with the companies there[illegible]amed and the said telegraph company or any other company o[illegible]mpanies, whose stock or lines may be owned or controlle[illegible]y [illegible]d telegraph company or made with other telegraph

companies or individuals, and assigned and transferred to or owned or claimed by said telegraph company for or in respect to the right of way over the railroads embraced in the schedule hereto attached, are hereby canceled and declared to be void and of none effect as between the parties hereto and thereto, and all and all manner of claims arising thereout, whether in suit or otherwise, are hereby terminated and settled, and the parties mutually released therefrom, and the parties complainants in any such suits agree to discontinue the same, each party agreeing to pay its own costs. This not to release any money actually due by either party to the other for rent or services rendered under said contracts.

27 Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination.

Eighteenth. In case of any difference of opinion between the parties hereto in relation to any of the provisions of this agreement, the matter in dispute shall be referred to two arbitrators, one of whom shall be appointed by the railroad company and the other by the telegraph company, and if the two referees so chosen cannot agree, then the two so selected shall select a third like disinterested and competent party, and the decision of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto; but if either of the parties hereto fail or refuse after ten days' written notice from the other to select a referee as aforesaid, then the party not in default shall select a referee as aforesaid for the party so failing or refusing to select, and the said two referees so selected if unable to agree shall select a third like referee and the three so chosen, or a majority of them, shall proceed as hereinbefore mentioned, and the award of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto.

In witness whereof, &c.

SCHEDULE A.

Philadelphia and Columbia railroad—West Philadelphia to Columbia, Pa.

Pennsylvania railroad—Harrisburg to Pittsburg, Pa.

Schuylkill River branch Pennsylvania railroad—Haverford street to Arsenal bridge.

Deleware extension Pennsylvania railroad—Arsenal bridge, West Philadelphia, to Dock Street depot.

Frazer branch—Frazer to near Woodland.

Columbia bridge—Over Susquehanna river at Columbia, Pa.

York branch—West end Columbia bridge to York, Pa.
Tyrone branch—Tyrone to junction Bald Eagle Valley railroad at Vail Station.
28 Hollidaysburg branch—Altoona to Hollidaysburg, with branch from Duncansville to Portage iron works.
Morrison's Cove branch—Hollidaysburg to Henrietta, Pa., with branch to Martinsburg.
Bloomfield branch—Roaring Spring to Ore Hill, Pa.
Williamsburg branch—Hollidaysburg to Williamsburg, Pa.
Springfield branch—Springfield Junction to ore mines.
Indiana branch—Blairsville intersection to Indiana, Pa.
Port Perry branch—Pennsylvania railroad near Brinton's, to Pittsburg, Virginia and Charleston railroad at Thomson.
Hudson River ferries—New York city to Jersey City, across Hudson river.
New Jersey railroad—Hudson river, at Jersey City to point 3½ miles west of New Brunswick, N. J., with branches from Harsimus Junction to pier No. 3; East Newark to Market street, Newark, and Metuchen to Bonhampton.
Trenton branch Camden and Amboy railroad—3½ miles west of New Brunswick to east end of Trenton Delaware bridge, with branches from Princeton Junction to Princeton, and Monmouth Junction to Kingston.
Perth Amboy and Woodbridge railroad—Rahway to Perth Amboy, N. J.
Millstone and New Brunswick railroad—New Brunswick to East Millstone, N. J.
Rocky Hill and Kingston railroad—Kingston to Rocky Hill, N. J.
Camden and Amboy railroad, main line—Camden to South Amboy, with branches from Bordentown to Trenton, and Jamesburg to Monmouth Junction.
Pemberton and Hightstown railroad—Pemberton to Hightstown, N. J.
Burlington and Mt. Holly railroad—Burlington to Mt. Holly, N. J.
Mt. Holly, Lumberton and Medford railroad—Mt. Holly to Medford, N. J.
Camden and Burlington County railroad—Camden to Pemberton, N. J.
Vincentown branch of Burlington County railroad—Ewansville to Vincentown, N. J.
Belvidere Delaware railroad—Trenton to Manunka Chunk, with branch from Coalport to Millham.
Flemington railroad—Lambertville to Flemington, N. J.
29 Trenton Delaware bridge—Over Delaware river, from Trenton, N. J., to Morrisville, Pa.
Philadelphia and Trenton railroad—West end of Trenton Delaware bridge, at Morrisville, Pa., to Kensington Station, Philadelphia, with branch on Tioga street to Delaware river.

Frankford and Holmesburg railroad—Holmesburg Junction to Bustleton, Pa.
Connecting railway—Philadelphia and Trenton railroad at Frankford Junction, to Mantua Junction, on Pennsylvania railroad.
West Chester railroad—Near Woodland to West Chester, Pa.
East Brandywine and Waynesburg railroad—Downingtown to New Holland, Pa.
Pomeroy and State Line railroad—Pomeroy, Pa., to Philadelphia, Wilmington and Baltimore Railroad intersection, Del.
Hanover and York railroad—York to Hanover, Pa.
Littlestown railroad—Hanover, Pa., to Maryland State line, near Kingsdale.
Frederick and Pennsylvania Line railroad—State line, near Kingsdale, to Frederick, Md.
Harrisburg, Portsmouth, Mt. Joy and Lancaster railroad—Dillerville to Harrisburg, with branch from Middletown to Columbia, Pa.
Philadelphia and Erie railroad—Erie to Sunbury.
Sunbury, Hazleton and Wilkesbarre railroad—Sunbury to Tomhicken, Pa.
Mifflin and Centre County railroad—Lewistown Junction to Milroy, Pa.
Lewistown and Tuscarora bridge—Over Juniata river, at Lewistown, Pa.
Sunbury and Lewistown railway—Lewistown borough to Selinsgrove Junction, N. C. railway.
Bedford and Bridgeport railroad—Mt. Dallas, Pa., to Maryland State line, with branch on Dunnings creek.
Bald Eagle Valley railroad—Vail Station to Lock Haven, Pa.
Tyrone and Clearfield railway—Vail Station to Curwensville, Pa., with branches to coal mines.
Lewisburg and Tyrone railroad—Tyrone to Pennsylvania furnace, and Montandon to Spring Mills.
30 Lewisburg bridge—Over Susquehanna river at Lewisburg, Pa.
Newry railroad—Portage iron works to Newry, Pa.
Ebensburg and Cresson railroad—Cresson to Ebensburg, Pa.
South-west Pennsylvania railway—Junction, near Greensburg, to Fairchance, Pa., with branches to coal mines.
West Pennsylvania railroad—Blairsville to Allegheny City, with branch to Butler, Pa.
Pittsburg, Virginia and Charleston railway—South Side, Pittsburg, to Belle Vernon.
Freehold and Jamesburg Agricultural railroad—Jamesburg to Sea Girt, N. J.
Pemberton and Sea Shore railroad—Pemberton Junction to Whiting's, N. J.
Columbus, Kinkora and Springfield railroad—Kinkora to New Lisbon, N. J.
Florence Branch railroad—Florence, N. J., to Wood's iron works.

Camden and Philadelphia steamboat ferry—Camden, N. J., to Philadelphia.
West Jersey railroad—Camden to Cape May, N. J., with branch from Glassboro to Bridgeton.
West Jersey and Atlantic railroad—Newfield to Atlantic City.
Swedesboro railroad—Woodbury to Swedesboro, N. J.
Salem railroad—Elmer to Salem, N. J.
Columbia and Port Deposit railroad—Columbia, Pa., to Port Deposit, Md.
Cumberland Valley railroad—Harrisburg to Potomac river, at Powell's Bend, Md.
Dillsburg and Mechanicsburg railroad—Mechanicsburg to Dillsburg, Pa.
Mont Alto railroad—Junction near Chambersburg, to Waynesboro, Pa.
Southern Pennsylvania railroad—Junction near Marion, to Richmond, Pa.
Martinsburg and Potomac railroad—Potomac river, at Powell's Bend, to Martinsburg, W. Va.
Northern Central railway—Baltimore, Md., to Sunbury, Pa., with branches to Green Spring and Canton, Md.
Elmira, Jefferson and Canandaigua railroad—Watkins to Canandaigua, N. Y.
Chemung railroad—Horse Heads Junction, Erie railway, to Watkins, N. Y.
31 Elmira and Williamsport railroad—Williamsport, Pa., to junction with Erie railway, near Elmira, N. Y.
Shamokin Valley and Pottsville railroad—Sunbury to Mt. Carmel, Pa., with branch to Hickory Ridge colliery.
Summit Branch railroad—Millersburg to Williamstown, Pa.
Baltimore and Potomac railroad—Baltimore, Md., to south end Long bridge, Washington, D. C., with branch from Bowie to Pope's creek.
Alexandria and Washington railroad—South end Long bridge to Alexandria, Va.
Alexandria and Fredericksburg railroad—South end Long bridge to Quantico, Va.
Bellefonte and Snow Shoe branch—Milesburg to Bellefonte, Pa.
Allegheny Valley railroad—Pittsburgh to Oil City, and Red Bank to Driftwood, with branches.

EXHIBIT 2.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *Oct.* 21, 1901.

R. W. Downing, comptroller, Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due October 21, 1901.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 3.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due Oct. 21, 1901, as per contract..... $6250 —

6250 —

32 Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher sixty-two hundred and fifty dollars in full of the above account.

Oct. 22d, 1901.

PENNSYLVANIA RAILROAD COMPANY.

(Sig'd) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— —— supt.

Paid Oct. 21, 1901, by M. T. Wilbur. treasurer.

No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 4.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *Nov.* 20, 1901.

R. W. Downing, compt., Philada., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due Nov. 21 '01.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 5.

The Western Union Telegraph Company to Pennsylvania Railroad Co., Dr.

Payment due Nov. 20, 1901, as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher, sixty-two hundred & fifty dollars in full of the above account.
Nov. 21, 1901.

PENNSYLVANIA RAILROAD COMPANY.
(Sig'd) H. P. CONNER, *Ass't Treas'r.*

33 Form No. 10. Approved: —— —— supt.
Paid Nov. 20 1901 by M. T. Wilbur treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 6.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *Dec.* 20, 1901.

R. W. Downing, comptroller, Phila. Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due Dec. 20 1901 (Pennsylvania R. R. Co.)
Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 7.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due Dec. 20, 1901 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher, sixty-two hundred & fifty dollars in full of the above account.

Dec. 21, 1901.

PENNSYLVANIA RAIL ROAD CO.

(Signed) H. P. CONNER, *Ass't Treas.*

34 Form No. 10. Approved: —— —— supt.
Paid Dec. 20, 1901 by M. T. Wilbur treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 8.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *Jan.* 20, 1902.

Pennsylvania R. R. Co., Philadelphia, Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250.—Payment due as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 9.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due January 20, 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Tel'g'h Co., subject to the notice upon the back of this voucher sixty-two hundred & fifty dollars in full of the above account.

Jan. 21, 1902

PENNSYLVANIA RAIL ROAD COMPANY.

(Signed) H. P. CONNER, *Ass't Treas.*

Form No. 10. Approved: —— —— supt.
Paid. Jan. 20 1902 by M. T. Wilbur treasurer.
No. —.
Correct H. C. L.

35 NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 10.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *Feb.* 20, 1902.

Pennsylvania R. R. Co., Philadelphia, Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due Feb. 20 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 11.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due February 20 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co. subject to the notice upon the back of this voucher — dollars in full of the above account.
Feb'y 21, 1902.

PENNSYLVANIA RAIL ROAD COMPANY.
(Signed) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.
Paid Feb. 20, 1902 by M. T. Wilbur, treasurer.
No. —. Correct. H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this
36 voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 12.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *March* 20, 1902.

Mr. R. W. Downing, comptroller, Penna. R. R. Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce, for $6250. Payment due March 20, 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 13.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due March 20 1902 as per contract..... ..... $6250 —

$6250 —

Received of treasurer W. U. Tel'g'h Co., subject to the notice upon the back of this voucher — dollars in full of the above account.
March 21, 1902.

PENNSYLVANIA RAIL ROAD COMPANY.
(Signed) H. P. CONNOR, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.
Paid Mar. 20/1902 by M. T. Wilbur treasurer.
No. —. Correct H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this
37 voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 14.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *Ap'l* 21, 1902.

Mr. R. W. Downing, compt. Penna. R. R. Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order on National Bank of Commerce for $6250. Payment due April 20th, '02 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 15.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due April 20th 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher sixty two hundred & fifty dollars in full of the above account.

April 22 1902.

PENNSYLVANIA RAIL ROAD CO.

(Sig'd) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— —— supt.
Paid April 21, 1902 by M. T. Wilbur treasurer.
No. —. Correct H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this
38 voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

EXHIBIT 16.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *May* 20, 1902.

Mr. R. W. Downing, compt. Penna. R. R. Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce for $6250. Payment due May 20, 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 17.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due May 20 1902 as per contract..... $6250 —

$6250 —

Received of treasurer W. U. Teleg'h Co., subject to the notice upon the back of this voucher sixty-two hundred & fifty dollars in full of the above account.
May 21. 1902.

PENNSYLVANIA RAIL ROAD COMPANY.
(Signed) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— —— supt.
Paid May 20 1902 by M. T. Wilbur treasurer.
No. —. Correct H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

39 EXHIBIT 18.

Western Union Telegraph Company, treasurer's office, Broadway and Dey street.

NEW YORK, *June* 20, 1902.

Mr. R. W. Downing, compt. Penna. R. R. Co., Phila., Pa.

DEAR SIR: I enclose herewith check to your order, on National Bank of Commerce for $6250. Payment due June 20, 1902 as per contract.

Please sign and return enclosed voucher.

Yours truly, M. T. WILBUR, *Treasurer.*

EXHIBIT 19.

The Western Union Telegraph Company to Pennsylvania R. R. Co., Dr.

Payment due June 20 1902 as per contract..... 6250 —

$6250 —

Received of — W. U. Teleg'h Co., subject to notice upon the back of this voucher — dollars in full of the above account.
June 21 1902.

THE PENNSYLVANIA RAILROAD COMPANY.
(Sig'd) H. P. CONNER, *Ass't Treas'r.*

Form No. 10. Approved: —— ——, supt.

Paid Jan. 20 1902 by M. T. Wilbur treasurer.
No. —. Correct H. C. L.

NOTICE.—The party signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at signer's own risk, and the company will not be responsible for any claim for payment thereafter.

40 EXHIBIT 20.

Pennsylvania Railroad Company.

PHILADELPHIA, 15*th May*, 1902.

Mr. Robert C. Clowry, pres't Western Union Tel. Co., New York city.

MY DEAR SIR: In pursuance of action taken by the board of directors of this company on 14th, May, 1902, I send the enclosed notice.

Kindly acknowledge receipt, and oblige.

Very truly yours,
(Signed) LEWIS NEILSON, *Secretary.*

To the Western Union Telegraph Company:

You are hereby notified to remove within six (6) months from the 1st day of June, 1902, all of your poles, wires, and property from the right-of-way and property of this company and of the other companies named in a certain agreement between this company and you

dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached,) or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and of the other companies referred to in good condition and free from the encumbrance of your said poles, wires, and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right-of-way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles, and other property, to the satisfaction of the general manager of this company.

In witness whereof, the said The Pennsylvania Railroad Company has caused its corporate seal to be hereunto affixed, duly attested by the signature of its proper officers, this fourteenth day of May, anno Domini, 1902.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By A. J. CASSATT, *President.*

Attest:

[SEAL.] (Signed) LEWIS NEILSON, *Secretary.*

41 EXHIBIT 21.

Western Union Telegraph Company.

NEW YORK, *May 20th*, 1902.

A. J. Cassatt, Esq., pres't Penna. R. R. Co., Philadelphia, Pa.

DEAR SIR: I am in receipt of a letter from Lewis Neilson, secretary, dated May 15th, in relation to the termination of the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company, dated September 20th, 1881; also a letter from A. J. County, assistant secretary, in relation to the termination of contracts of the Philadelphia, Wilmington and Baltimore Railroad Company; the Delaware Railroad Company; the Delaware, Maryland and Virginia Railroad Company; the Junction Railroad Company, and the Philadelphia and Baltimore Central Railroad Company, respectively, with the Western Union Telegraph Company.

I understand that for some time prior to my election as president of this company, in March last, negotiations had been in progress between the officers of our respective companies for a renewal of these contracts on terms satisfactory to both parties; and Vice-President Clark has recently turned over to me a draft of proposed new agreement in connection with which I believe we have been await-

ing some figures from your company. I shall be glad to take up the matter actively, either here or at Philadelphia, at your convenience.

Yours truly,
(Signed) R. C. CLOWRY,
Pres't and Gen. Mgr.

EXHIBIT 22.

Pennsylvania Railroad Company.

PHILADELPHIA, *May* 21*st*, 1902.

Mr. R. C. Clowry, pres't & gen. mgr. Western Union Tel. Co., N. Y. city.

DEAR SIR: In reply to your favor of the 20th instant, I beg to say that none of the companies named in your letter desires to renew or extend its contract with the Western Union Telegraph Co. As you are aware, the contract between the Western Union Telegraph Co. and the Pennsylvania R. R. Co. terminated, under its terms, on the 20th of September, 1901, and the notices to which you
42 refer, for the removal of the poles within six months, were given in accordance with a provision of the contract. If your company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of your poles, we shall be glad to take up those matters with you at your convenience.

Yours truly,
(Signed) A. J. CASSATT, *Pres't.*

EXHIBIT 23.

Western Union Telegraph Company, president's office.

NEW YORK, *June* 26, 1902.

A. J. Cassatt, Esq., president, etc., Philadelphia, Pa.

DEAR SIR: I have your favor of May 21st in which you state that none of the companies named in my letter of the 20th desires to renew or extend its contract with the Western Union Telegraph Company, and that the contract between the Western Union Telegraph Company and the Pennsylvania Railroad Company terminated under its terms on the 20th of September, 1901, and that the notices which were referred to for the removal of the poles within six months were given in accordance with a provision of the contract, and that if my company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of its poles you will be glad to take up those matters with me at my convenience.

Replying thereto, I have to state that this company will be glad to have a conference with your company with a view of adjusting amicably any and all differences that may be found to exist between them, thus avoiding litigation and any possible interference with the duties which this company owes to the Government and the public. I request and urge that you fix a time and place for such a conference, which seems to be the more necessary because your letter appears to be based on a material misunderstanding of the facts in relation to the termination of the contracts and the rights of this company, since some of the contracts referred to in your letter are perpetual in their terms, or run during the life of the parties, and, therefore, cannot be terminated by one party without the consent of the other. As bearing on the subject, I enclose a copy of a
43 letter which I sent and delivered yesterday to the Postal Telegraph-Cable Company; also copies of two letters, dated June 24th, to James McCrea, Esq., vice-president, Pittsburgh, Pa., which letters were sent only after a careful examination of the contracts and the legal rights of the parties by our counsel.

It seems proper to add that such a conference as we ask ought to be had before your company concludes any arrangement adverse to this company which would necessitate litigation by this company to enforce its rights. Under the contracts by which the lines of this company on the roads mentioned in your letter of May 21st were brought into existence, the laws of Congress and the constitution and laws of Pennsylvania, this company is advised that it is entitled to maintain and operate its lines of telegraph on the said railroads, subject, only, at most, to make a fair and reasonable compensation to the railway companies for this right, and this company is willing and hereby offers to make such compensation. If your company declines further to contract with this company, I respectfully request a meeting for the purpose of agreeing upon the amount of such compensation, and if no such agreement can be made, that the matter be submitted to arbitration, your company selecting one arbitrator and this company another, and the two arbitrators thus selected to choose a third, or to have the amount of such compensation determined in any other equitable manner. I shall appreciate an answer at your early convenience, and I venture to express the wish that, in view of the large public and private interests which we represent, that you will meet this company in its earnest endeavor to avoid unnecessary and wasteful litigation.

Very truly yours,

(Signed) R. C. CLOWRY, *President.*

3 inclosures.

EXHIBIT 24.

The Pennsylvania Railroad Company.

PHILADELPHIA, *July 5th*, 1902.

Mr. R. C. Clowry, president and general manager Western Union Telegraph Company.

DEAR SIR: I beg to acknowledge receipt of yours of the 26th ultimo.

In my letter of the 21st of May I suggested a conference which I thought you might possibly desire to have for the purpose of making any temporary arrangements you might find necessary under the notice which has been given to your company. This conference I infer you do not care to have.

A conference concerning the matters you suggest would be useless as your company asserts rights upon the lines of railroad of the companies I represent which they cannot concede.

Noting your reference to the Postal Telegraph-Cable Company, I beg to advise you that a contract has been concluded with that company covering the railroads included in the contract which terminated on September 20th last, under the terms of which the Postal Telegraph-Cable Company will at once begin to transact a commercial telegraph business at the stations of the railroad companies, and while the right of your company to do business at such stations has ceased, yet, as we are desirous of causing you as little inconvenience as possible, we will permit our operators to continue to receive and transmit such messages as the public may desire to send by your lines until September 30th next; the operators to be considered as acting as your agents in that respect and you to account to the railroad companies for their compensation on a basis equal to that fixed by the former contract.

To avoid unnecessary loss to your company incident to the removal of your poles and wires, we are willing to purchase, at a fair valuation, such of the lines as we can make use of, and if you desire to take up this question, Mr. Charles M. Sheaffer, superintendent of telegraph, will hold himself in readiness to meet a representative of your company to agree upon the price of such lines.

Yours truly,

(Signed) A. J. CASSATT, *President.*

EXHIBIT No. 25.

POST OFFICE DEPARTMENT.

(Ten cent revenue stamp.)

WASHINGTON, D. C., *Feb'y 17th*, 1899.

I, Perry S. Heath, acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department:

45 In testimony whereof, I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the city of Washington the day and year above written.

[SEAL.]

PERRY S. HEATH,
Acting Postmaster General.
B. W. T.

Annexed to the foregoing is the following, to wit:

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway, New York.

JUNE 5TH, 1867.

Resolved that this company does hereby accept the provisions of the act of Congress, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the Secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature of the acting president of the company, and the seal of the corporation in compliance with the fourth section of said act of Congress.

Adopted unanimously.

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Sec'y W. U. Tel. Co.

[Seal Western Union Telegraph Co.]

Filed June 8th, 1867.

JOS. H. BLACKFAN,
Chief Clerk.

46 EXHIBIT 26.

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
against
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants. } Petition.

The Western Union Telegraph Company, by its attorney comes and represents:

(1.) That it is a telegraph company, a corporation duly organized under the laws of the State of New York relating to telegraph companies and a citizen and resident of the State of New York, having its principal place of business in the southern district of said State, and is and for many years last past has been doing business within the State of New York, the State of New Jersey, and the other States and Territories of the United States, and within the Dominion of Canada, as a telegraph company.

(2.) That the defendant The Pennsylvania Railroad Company is a corporation duly organized under the laws of the State of Pennsylvania and is a citizen and resident of the State of Pennsylvania, having its principal place of business in the city of Philadelphia; that the defendant The United New Jersey Railroad and Canal Company is a corporation duly organized under the laws of the State of New Jersey and is a citizen and resident of said State.

(3.) That the matters in controversy in this suit exceed the value of two thousand dollars, exclusive of interest and costs and are wholly between citizens of different States and arise under the Constitution and laws of the United States and in which the Western Union Telegraph Company claims privileges and rights under acts of Congress and the Constitution and laws of the United States.

(4.) The Western Union Telegraph Company further says, that it was organized as a telegraph company as aforesaid in the year 1851, and thereupon and thereafter began the work of the
47 construction and operation of telegraph lines in the State of New York and elsewhere, and since said time has been continuously engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has extended its lines as a continuous system into and through the State of New Jersey, and through all the States and Territories of the United States, and through the Dominion of Canada; and that its lines connect with ocean cables leading to Central and South American and foreign countries, through and over which system of lines it transmits upwards of 65,000,000 messages yearly for the public and for the Government of the United States, exclusive of railroad

messages, messages relating exclusively to its own business, and messages transmitted over wires leased by it to private parties; that at the present time said system of telegraph lines under its operation and control, comprises over 192,000 miles of poles and cables and over 900,000 miles of wire; and its capital stock is distributed among over 11,000 stockholders. That the lines of telegraph in the system above described have been in operation for many years past and are relied upon by the public and by the Government of the United States and by the governments of foreign countries as a means of quick transmission of intelligence to and from all parts of the United States and to and from foreign countries.

(5.) That the Congress of the United States duly passed an act, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes;" and that the Western Union Telegraph Company, on or about the 8th day of June, 1867, duly accepted the provisions of said act by filing with the Postmaster-General of the United States in writing the acceptance by said company of all the restrictions and obligations of the said act of Congress, and thereby and thereafter continuously became, and has been and still is, entitled to all the privileges and rights granted by the said act of Congress to telegraph companies, thus accepting the benefits, restrictions and obligations of said act, and the said telegraph company has, at all times, complied with the provisions of said act and has rendered to the various departments and officers of the Government of the United States all the duties and services required by said act, giving to the said Government of the United States priority over all other business, and at rates fixed by the Postmaster-General, which rates, as thus fixed by him, have been very much lower than the reasonable rates charged for similar services rendered to the general public.

48 A duly exemplified copy of the plaintiff's said acceptance of the said act of July 24, 1866, is hereto attached as part of this petition, marked *Exhibit No. 1.*

(6.) That by act of Congress, approved June 8, 1872, all railroads or parts of railroads which then or thereafter might be in operation, were declared to be established post-roads, and by a further act of Congress, approved March 1, 1884, all public roads and highways, while kept up and maintained as such, were declared to be post-roads; and by the provisions of said act of Congress, approved July 24, 1866, there was granted to any telegraph company then organized, or which might thereafter be organized under the laws of any State, and which accepted in writing the provisions of said act, the right to construct, maintain and operate telegraph lines through and over any portion of the public domain and over and along any of the military or post-roads of the United States which then were or might thereafter be declared such by law, subject to the condition only that such lines of telegraph should be so constructed and maintained as not to obstruct the navigation of streams or waters

over, under or across which the same should be laid, or interfere with the ordinary travel on such military or post-roads.

(7.) That the said acts of Congress apply to the railroads of the defendants herein mentioned and described and the said railroads are post-roads of the United States duly established by act of Congress in that behalf provided, and also public roads and highways under said acts of Congress and the laws of the State of New Jersey relating to said railroads. That the plaintiff, The Western Union Telegraph Company, having duly filed its written acceptance with the Postmaster-General of the restrictions and obligations of the said act of July 24, 1866, and fully complied with all the requirements of said acts of Congress, above mentioned, and of law, has the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendants herein mentioned and described so as not to interfere with the ordinary travel thereon, and the plaintiff is ready and willing to make to the defendants, and each of them, a just compensation for such use by the plaintiff of the roadway or right of way of the defendant companies for the plaintiff's telegraph lines over and along the said railroads of the defendants.

(8.) That the said grant by the United States in and by the aforesaid acts of Congress of the right to construct, operate and
49 maintain the telegraph lines of the plaintiff on the railroads of the defendants was a grant made upon a full, valuable and continuing consideration paid and rendered by the plaintiff to the United States, which consideration was the agreement of the plaintiff evidenced by the plaintiff's written acceptance of the act of July 24, 1866, duly filed on June 8, 1867, with the Postmaster-General, of the restrictions and obligations of the said act, and the performace by the plaintiff of all of the duties and obligations created and required by said acts of Congress. That the plaintiff has since said acceptance of said act performed all its obligations required by said acts and by law, and the plaintiff has even since the date of filing of said acceptance given, and is still giving, to the United States, and to the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of the plaintiff company, situated over and along the railroads of the defendants, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by the plaintiff for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered to the Government. The plaintiff has accepted, among others, the provisions of the said act of Congress of July 24, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said act of Congress. The plaintiff states that by reason of the premises, its acceptance of the said act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by the plaintiff of the provisions of the said

acts of Congress, the right granted by the said act of July 24, 1866, to the plaintiff to construct, maintain and operate its lines of telegraph over and along the railroads of the said defendants became vested, and the said grant is in full force and effect, and the plaintiff avers that its rights to construct, maintain and operate its said lines of telegraph over and along the railroads, and right of way of the defendant companies is complete, the plaintiff being under an obligation or liability only to make fair and reasonable compensation to the defendants for the use of the said right of way or railways of the defendants by the plaintiff in the manner and under the restrictions of the said acts of Congress.

(9.) That the defendant, The United New Jersey Railroad and Canal Company, is the owner of lines of railway extending from Jersey City in the State of New Jersey to the Delaware river at the city of Trenton in said State, with the following branches:

50 One extending from Princeton Junction in the county of Mercer to the borough of Princeton in said county.

One extending from the city of Rahway in the county of Union to the city of Perth Amboy in the county of Middlesex.

One extending from South Amboy in the county of Middlesex to the city of Camden in the county of Camden.

One extending from the main line in the town of Harrison, Hudson county to Centre street, Newark, Essex county.

One extending from Monmouth Junction, Middlesex county to the southerly terminus of the Rocky Hill railroad near Kingston, Somerset county.

One extending from Millham Junction on the main line in Hamilton township in connection with Belvidere connection in Trenton city.

One extending from junction with Belvidere connection and Belvidere Delaware R. R. in Trenton city, to connection with Bordentown branch.

One extending from junction with the main line in connection with Belvidere and Delaware railroad and Bordentown connection.

One extending from the main line at Monmouth Junction to Jamesburg, Middlesex county.

One extending from Camden & Amboy division at Bordentown, Burlington county, to Trenton, Mercer county.

One extending from the main line at Florence to Delaware river Florence foundry Burlington county.

That all said railways are within the State of New Jersey and within the jurisdiction of this court in this district; that at many points said lines of railway are constructed and maintained over and along the public streets, roads and highways in cities and villages and over and along public highways in the country and within the limits of said streets, roads and highways; that The Pennsylvania Railroad Company, defendant herein, is in possession, control and operation of the said lines of railway under a lease from

the said United New Jersey Railroad & Canal Company for the period of 999 years, from the first day of July, 1871.

That the railroads of the United New Jersey Railroad and Canal Company hereinbefore described were authorized and constructed and are now maintained, operated and controlled under and by virtue of certain acts of the legislature of the State of New Jersey, as follows:

(1.) An act entitled "An act to incorporate the Delaware and Raritan Canal Company," passed February 4, 1830.

51 (2.) An act entitled "An act to incorporate the Camden and Amboy Railroad and Transportation Company," passed February 4, 1830.

(3.) An act entitled "An act to incorporate 'The New Jersey Rail Road and Transportation Company,'" passed March 7, 1832.

(4.) An act entitled "An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies," passed February 15, 1831.

(5.) An act entitled "A further supplement to the act entitled 'An act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies,'" passed March 15, 1837.

(6.) An act entitled "An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia," approved February 27, 1867.

(7.) An act entitled "An act to enable the United Railway and Canal Companies to consolidate their stock and to consolidate or connect with other companies," approved March 17, 1870.

(8.) An act entitled "An act to amend an act entitled 'An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia,'" approved March 14, 1872.

(9.) An act entitled "An act to validate and confirm a certain lease and contract between the companies now known as 'The United New Jersey Railroad and Canal Company' and 'The Pennsylvania Railroad Company,'" approved March 27, 1873.

That in and by said last mentioned acts and the several supplements thereto, and acts amendatory thereof, and the general public laws of the State of New Jersey, the said several railroads of the said defendants hereinbefore described, were created and made and now are public highways, and as such subject to occupation and use by telegraph companies under the provisions and conditions of the act of Congress of July 24, 1866, as herein fully set forth.

(10.) That for more than forty years last past there has been maintained and operated over and along the right of way of the said railroads hereinbefore described a line of telegraph owned, maintained and operated by the Western Union Telegraph Company or its predecessors in title or estate or right, which has thus been maintained and operated with the consent of the defendants,

52 The Pennsylvania Railroad Company, The United New Jersey Railroad & Canal Company or their predecessors in title,

and which has been and is now located, maintained and operated as not to interfere with the ordinary operation and management of the said railways or the ordinary travel thereon; that the Western Union Telegraph Company is in possession and control of the said telegraph lines and the same have been and still are connected with its system of telegraph in other States, Territories and foreign countries and have been continuously operated by it as a means for the transmission of intelligence for the public and for the Government of the United States and over the same are daily sent many thousands of messages to and from its main office in the city of New York and to and from the various States and Territories of the United States and foreign countries; that the said telegraph lines have been thus maintained and operated by the Western Union Telegraph Company for the 20 years last past with the consent of the Pennsylvania Railroad Company.

(8.) That said Pennsylvania Railroad Company has recently, to wit May 15th, 1902, notified the Western Union Telegraph Company to remove its poles and wires, and has withdrawn its consent to plaintiff to longer occupy its premises; that thereupon the said Western Union Telegraph Company duly made application to the said Pennsylvania Railroad Company to have ascertained and determined the amount of compensation to which said Pennsylvania Railroad Company would be entitled for the continued maintenance and operation of the said lines of telegraph over and along the said railways of the defendants under and subject to the terms, conditions and restrictions of the said act of Congress of July 24, 1866; but said railroad company refused and declined to treat with the Western Union Telegraph Company or to agree or attempt to agree upon the amount of compensation for the construction, maintenance and operation of said telegraph lines or any of them over and along the said railways; on the contrary the said defendant railroad companies deny that the said acts of Congress confer upon the Western Union Telegraph Company any right to construct, maintain or operate its telegraph lines over and along said railways.

The Western Union Telegraph Company further says that the said line of telegraph can continue to be located, maintained, and operated without interference with the ordinary travel on the said railroad or the ordinary use, management, and operation of the
53 said railway and that the plaintiff seeks to construct, maintain and operate its lines of telegraph along said lines of railway subject to the conditions named in said act of Congress of July 24, 1866, that such lines of telegraph should be so constructed and maintained and operated as not to interfere with the ordinary travel on the said railroad, and subject also to the condition that when in the future, the location, maintenance and operation of its said lines should be found to interfere with the ordinary travel upon and use of said railways, to make such reasonable changes in the location, maintenance and operation of said parts of said lines of telegraph as that the ordinary travel upon said railways should be

and remain uninterfered with by such lines of telegraph, as provided in the said act of Congress of July 24, 1866.

(12.) That the plaintiff, on June 8, 1867, duly accepted as aforesaid the said act of July 24, 1866, and acting thereon immediately entered upon the performance of and has ever since continued to perform all of its duties and obligations thereunder to the United States and the public, and the plaintiff was in possession and enjoyment of its telegraph lines over and along said defendants' railroads herein mentioned and described and of the rights granted and conferred upon it by said act of July 24, 1866, long before and at the time the Pennsylvania Railroad Company became the lessee of said railroads or acquired any interest therein or use or control thereof, of all of which the defendants then and there had notice; and the plaintiff is advised and now avers that the rights of the defendants in said railroads are subject to the rights of the plaintiffs under said acts of Congress and the laws of New Jersey and in particular the plaintiff avers that the said lease of said railroads to The Pennsylvania Railroad Company, defendant herein, and any rights acquired by said Pennsylvania Railroad Company in or to said railroads or the use, possession or control thereof are subject to the rights of the plaintiff granted and conferred upon it by the said act of Congress of July 24, 1866, and acquired by the plaintiff by its acceptance of said act and its performance of all the obligations and requirements of said acts of Congress.

(13.) The Western Union Telegraph Company further represents that it is necessary for the continued maintenance and operation of its said lines of telegraph, that it shall have and enjoy the right to set poles and the right to maintain poles set along the right of way of the said railway company at such point or points thereon as that they will not interfere with the ordinary travel upon and use
54 of the said railways, as the said poles have been heretofore and now are located thereon, with the right to place cross arms and fixtures thereon and to string wires, together with the right to maintain and operate the same, and also the right to cable crossings where the said lines cross navigable waters, in order to connect the lines of wire upon the said poles with other lines of wire belonging to the said telegraph company, upon the said railways, as the plaintiff's system is now constructed, maintained and operated for the communication of intelligence to all parts of the United States, and as the same may be required to be extended and increased to meet the increasing demand for facilities of communication between different parts of the country as an agent of interstate commerce, and as a method of transmitting messages for the Government of the United States and for the several departments thereof; that the plaintiff has sought from the said Pennsylvania Railroad Company to procure its consent to the continuance in the present location upon the said right of way of the poles, cables, wires and fixtures where the same do not now interfere with the ordinary travel upon and use of said railways, with the provision that the same should

be subject to reasonable changes to meet the requirements of changes in the situation of the said railways from time to time, so that the telegraph lines should not at any time hereafter interfere with the ordinary travel upon and use of the said railways; that the said railroad companies have refused to consent to the said location of the said poles, cables and wires and fixtures over and along the said railway or to agree or attempt to agree upon the amount of compensation which the said telegraph company should pay to the defendants for the use of their railroads by the plaintiff in order to construct, maintain and operate on said railroads a line of telegraph by the plaintiff as hereinbefore set forth, subject to all the conditions and provisions of the said act of Congress of July 24, 1866.

(14.) That the Western Union Telegraph Company attaches hereto a map showing upon the same the location of cable crossings, of poles and number of wires thereon, the location of wires upon the bridges of the said railway companies, and also the location of the said line of poles with reference to the tracks and structures of said railways as now located and maintained as hereinbefore set forth. And upon which location the plaintiff seeks to maintain and operate under the provisions, restrictions and conditions of said act of Congress of July 24, 1866, its said telegraph lines, and for the use of the defendant's said railroads the plaintiff is ready and willing and has offered and hereby again offers to make compensation.

55 (15.) The Western Union Telegraph Company further says that on or about the 6th day of July, 1894, it duly caused a certificate to be signed by its president and its corporate seal to be attached and filed in the office of the secretary of state of the State of New Jersey, in compliance with the provisions of an act of the legislature of the State of New Jersey, entitled "An act relative to corporations," approved May 15th, 1894, and a supplement thereto approved May 17, 1894.

Wherefore, the Western Union Telegraph Company prays that this court may proceed to appoint commissioners, or to empanel a jury, or issue a writ of *ad quod damnum*, or issue such other process or take such other modes of proceedings as may be agreeable to the principles and usages of law, and as shall be necessary to make inquiry and assessment of the amount of compensation to be paid by the said Western Union Telegraph Company for the use of the roadway or right of way of the defendants to construct, maintain, and operate its said line of telegraph over and along the said railways of the defendants, subject to the conditions and provisions named in the said act of Congress of July 24, 1866; and that upon the payment into court or to the proper owners, defendants herein, as this court may direct, of the amount of such compensation for the said rights and interests acquired thereby by the said Western Union Telegraph Company, possession be adjudged to the Western Union Telegraph Company by this court of the said use, rights and interests according to law, and that the title to the said rights and inter-

ests as against the defendants and each of them, thereby vest in the said Western Union Telegraph Company for the purposes aforesaid, and that the court will divide the sum so paid and order its distribution among the defendants herein according to their respective rights, as they may appear; and for such other and further proceedings, order and judgment as may be proper in the premises.

The plaintiff has caused this petition to be signed by its president and its corporate seal attested by its secretary to be hereto affixed.

—— ——, *President.*

Attest: —— ——, *Secretary.*

—— ——,

Attorney for Western Union Telegraph Company.

56 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Robert C. Clowry, being duly sworn, says he is president of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

—— ——.

Sworn to before me this — day of —— 1902.

EXHIBIT No. 1.

POST OFFICE DEPARTMENT.

(Ten cent revenue stamp.)

WASHINGTON, D. C., *Feb'y 17th*, 1899.

I, Perry S. Heath, acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department:

In testimony whereof, I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the city of Washington the day and year above written.

PERRY S. HEATH,
Acting Postmaster-General.

[SEAL.] B. W. T.

Annexed to the foregoing is the following, to wit:

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway, New York.

JUNE 5TH, 1867.

Resolved, That this company does hereby accept the provisions of the act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the secretary be and is hereby
57 authorized and directed to file this resolution with the Postmaster-General of the United States, duly attested by the signature of the acting president of the company, and the seal of the corporation in compliance with the fourth section of said act of Congress.

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Sec'y W. U. Tel. Co.

[Seal Western Union Telegraph Co.]

Filed June 8th, 1867.

JOS. H. BLACKFAN,
Chief Clerk.

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
against
THE PENNSYLVANIA RAILROAD COMPANY and THE NEW JERSEY Railroad and Canal Company, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

Belvidere Brooks being first duly sworn, says that he is a citizen and resident of the State of New York and is general superintendent of the Eastern and Southern divisions of the Western Union Telegraph Company; that as such general superintendent he is in charge of all the lines of telegraph of that company east of the State line between Ohio and Pennsylvania, south of the Ohio river, and east of the Mississippi river in the United States; that he has been in the telegraph service for the past thirty years in various capacities, as operator and manager, assistant superintendent, and general superintendent, and in these various capacities has had experience in the construction, reconstruction, maintenance and operation of telegraph

lines; and has learned and knows the cost and value of such
58 lines; that the lines of telegraph along the various lines of railway owned, controlled and operated by the Pennsylvania Railroad Company have been under the supervision and control of the affiant as general superintendent since on or about the 1st day of May, 1902; that he has personally inspected most of said lines and has, in his official capacity as general superintendent received reports of inspection of all of said lines from time to time and knows from said official reports and from his inspection of said lines the condition, capacity and value of the said lines and the character of the business that is transacted on and over said lines and each of them, the connections of said lines, and the relations of said lines to the other lines in the system of telegraph lines of the Western Union Telegraph Company, as operated by it from its central office in the city of New York. That he has personally inspected the lines involved in the above-entitled action situated within the State of New Jersey and knows the general condition of the same and the connections of the same and the business conducted upon and for the same; and the said lines involved in the above-entitled action connect with through lines on the lines of railway of the defendant Pennsylvania Railroad Company reaching to Philadelphia and thence to Baltimore and Washington and points beyond on the south and through Philadelphia to Harrisburg, Pittsburg and points beyond on the west, the same being operated as a continuous and connected system of telegraph lines, and that the said lines are constructed, maintained and operated as such continuous and connected lines of telegraph; that affiant knows and is able to state the reasonable and fair value of the physical property constituting said system of telegraph lines as the same now stands and exists along and upon the lines of railway owned, controlled, and operated by the Pennsylvania Railroad Company and referred to and included in the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company dated September 20th, 1891, attached to the bill in the above-entitled cause as Exhibit 1; that the poles, wires and physical property constituting the said lines of telegraph as they now stand and are operated and maintained along and upon the said lines of railway are of the value of one million, two thousand dollars ($1,002,000.00); that affiant, from his experience in the construction, operation and maintenance of telegraph lines, knows the value of the materials and property composing the said lines of telegraph, both new and second-hand, and is able to state from his knowledge and experience the value of
59 said lines when taken down and removed from the said lines of railway owned, controlled or operated by the Pennsylvania Railroad Company and included within the said contract exhibit; that the said lines of telegraph taken down and removed from the premises of the said railroad company would not exceed in value one hundred and seventy-five thousand dollars ($175,000.00); that affiant has had experience in the construction,

maintenance and operation of telegraph lines along and upon lines of railway and that such construction, maintenance and operation of telegraph upon lines of railway is universal throughout the United States — affiant knows from experience and observation the extent of interference by telegraph lines with the ordinary travel upon said railways, and telegraph lines constructed, maintained, and operated as the lines of the Western Union Telegraph Company are maintained and operated along and upon the railway lines owned, controlled or operated by the Pennsylvania Railroad Company as hereinbefore described, do not interfere with the ordinary travel upon said lines of railway, and that the said lines of telegraph can continue to be so maintained and operated as not to interfere with the ordinary travel upon and operation of said railway; that in the maintenance of telegraph lines along and upon railways it is customary and usual from time to time, in case of change of tracks or a location of tracks or of making of additional tracks, to shift a portion of the poles to accommodate the said changes in the tracks or structures of the railway, and that this is well understood by railway and telegraph managers, and that with such changes made in the said telegraph lines, poles, and wires, it is entirely practicable to accommodate the said telegraph lines to the daily operation of said railways without any interference therewith or with the travel thereon and that the said presence of said telegraph lines along and upon said railways will not interfere with the operation of said railways in any manner.

Affiant further says that he knows the situation and value of the physical property composing the lines of telegraph within the district of New Jersey referred to in the foregoing suit, which form a part of the lines hereinbefore described and connected with and operated as a part of the same; that the value of the said physical property of the lines in the district of New Jersey under the jurisdiction of this court and involved in the above-entitled action, as the said lines now stand, and are operated, is of the value of three hundred and forty-five thousand dollars ($345,000.00); and that the value of the said physical property in said lines removed from the premises of the said railway company would be of the value of not to exceed fifty-five thousand dollars ($55,000.00); and that the said lines can be maintained and operated along and upon the lines of railway as hereinbefore described without interference with the ordinary travel upon or the operations of said railways or any of them.

Affiant further says that he knows the amount of telegraph business that is being transacted over and upon said lines for the public and for the Government of the United States and that said lines are at all times taxed to their utmost capacity to enable the telegraph company to discharge its duty to the public and the Government of the United States in the transmission of messages and telegraphic despatches for the public, and that the cutting of said lines out of the system of the Western Union Telegraph Company on

the first day of December, 1902, as contemplated by the notice given by the Pennsylvania Railroad Company would result in depriving the public and the Government of the United States of facilities that are now being used and that the Western Union Telegraph Company would not then be able, notwithstanding the utmost diligence and effort made by it for the past six months, to provide facilities to accommodate the public to afford other facilities to equally accommodate the public business.

That he has read paragraph- 26, 27 and 28 of the bill in the above-entitled action, and that the allegations thereof in respect of the matters referred to in the foregoing affidavit are true. That in addition to the damages to the physical property of the telegraph company by the cutting down and removal of said lines, the damages to the business of the said company are incapable of direct estimate, but they are very great and not capable of being compensated for in damages.

BELVIDERE BROOKS.

Sworn to before me this 22d day of November, 1902.

CHARLOTTE A. VAN BRUNT,
[L. S.] *Notary Public, Kings County, No. 4.*

Certificate filed in New York county.

61 *Subpœna ad Respond.*

(Filed April 24, 1903.)

UNITED STATES OF AMERICA, *District of New Jersey,* } ss:

To the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, Greeting:

For certain causes, offered before the circuit court of the United States of America, for the third circuit, within and for the district of New Jersey, as a court of chancery, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally be and appear before our said circuit court, at the rules to be holden at the office of the clerk of our said court, in the city of Trenton, N. J., in said district, on the first Monday, being the fourth day of May next, to answer concerning those things which shall then and there be objected against you by the Western Union Telegraph Company, and to do further and receive that which our said circuit court shall consider in this behalf. And this you are in no wise to omit, under the penalty of five hundred dollars, and have you there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

United States of America, at Trenton, this eighth day of April nineteen hundred and three.

[L. S.] S. D. OLIPHANT, *Clerk.*

MEMORANDUM.—The defendant- *is* to enter *his* appearance in the suit, in the clerk's office, on or before the date at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

Endorsed: United States circuit court, district of New Jersey. The Western Union Telegraph Company *vs.* The Pennsylvania Railroad Company, *et al. Subpœna ad respond.* Returnable May 4th 1903. Rush Taggart, complainant's solicitor, 195 Broadway, New York city. Service acknowledged for both defendants by James B. Vredenburgh, sol. April 10, 1903. Filed April 24, 1903. S. D. Oliphant, clerk.

62 United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants.
} On Bill, &c.

Order to Show Cause.

(Filed November 22, 1902.)

On reading and filing the bill of complaint in the above entitled cause, and the affidavits annexed thereto,

It is, on this twenty-second day of November, A. D. nineteen hundred and two, ordered that the defendants The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company show cause before this court, at a session thereof to be held at the Post-office building in the city of Trenton, on Monday, the eighth day of December, nineteen hundred and two, at ten thirty o'clock in the forenoon, why a preliminary injunction should not issue according to the prayer of the said bill of complaint.

And it is further ordered that in the meantime, and until the further order of this court, the said defendants and each of them, their servants, agents and employés, do desist and refrain from cutting down or removing, or in any manner interfering with the maintenance and operation of the complainant's lines of telegraph, or any of them, now standing, existing and being on the several railroads of the said defendants, or either of them, described in the said bill of complaint.

And it is further ordered that a copy of this order and of the said

bill of complaint (neither of which need be certified) be served upon the said defendants within three days from the date hereof.

ANDREW KIRKPATRICK, *Judge.*

63 United States Circuit Court for the District of New Jersey.

Between—

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
and
THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY and The Pennsylvania Railroad Company, Defendants.
} On Bill.

Order Continuing Order to Show Cause.

(Filed December 8, 1902.)

The order to show cause why a preliminary injunction should not issue according to the prayer of the said bill of complaint, coming regularly on to be heard;

It is, on this eighth day of December, nineteen hundred and two, ordered that the hearing of said order be adjourned until Thursday, the eighteenth day of December, nineteen hundred and two, at 10:30 o'clock in the forenoon, at the Post-office building in the city of Newark, all parties consenting thereto.

ANDREW KIRKPATRICK, *Judge.*

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW Jersey Railroad and Canal Company.

Affidavit of Charles E. Pugh.

(Filed December 18, 1902.)

Charles E. Pugh, being duly sworn, deposes and says:

1. I am the second vice president of the Pennsylvania Railroad Company and as such have immediately under my supervision the operation of the company's railroad system. I have
64 been connected with the railroad company for upwards of forty years and am thoroughly familiar with its past and

present use of the right of way of the railroads belonging to the United New Jersey Railroad and Canal Company, of which the Pennsylvania Railroad Company is the lessee, and with the probable extent of its future use thereof. I have also had considerable familiarity for many years with the nature and extent of the telegraph wires and poles which have been used in connection with said railroads.

2. On or about the twentieth day of September, 1881, a contract for the term of twenty years from its date was entered into between the Western Union Telegraph Company and the Pennsylvania Railroad Company, of which a copy, marked "Exhibit A" is hereto attached. This contract was entered into by the railroad company in order that it might be enabled to secure telegraphic facilities necessary to it in and about the transaction of its business, which it was not able properly and sufficiently to secure by a line of telegraph wires and poles owned by and operated exclusively by itself. By said contract it secured a considerable revenue to itself and was also enabled to secure telegraphic facilities requisite in the transaction of its business as above stated.

3. Under said contract a line of poles has been maintained by the Western Union Telegraph Company, which covenanted to remove the same after receipt of a notice as to removal as in and by said contract is specified. Operations under the same convinced the officers of the railroad company that it would be safer and better for it, in the proper transaction of its business of transportation, to reserve to itself the ownership of any poles which under any new contract might be erected. Danger to persons and to property transported on the railroad is involved in the construction and maintenance on its line of a line of telegraph poles and wires not under the control of the railroad company. It is necessary that it shall, from time to time, be able to make such changes in the location and construction of the poles and wires as it shall find necessary for safety and convenience.

The Western Union Telegraph Company, under said contract, has constructed and operated on the line of the railroad such a line of poles, on which are fastened arms or cross-bars, on which latter the wires are strung. The ordinary width of these cross-bars is about seven feet eleven inches. Where the pole is so located as to bring the whole of the cross-bar within the line of the right of way of the railroad, it is necessarily located about four feet from the edge. Poles can be located upon the extreme edge of the right of way only when used in connection with cross-bars on one side thereof. In this case the cross-bar would project beyond the pole over the right of way about seven feet, eleven inches. In case of storm of snow or ice, danger to persons and property transported on the railroad thereunder will necessarily be involved in the latter mode of construction. I do not approve of such mode. At certain places along the line of our railroad, especially at curves, the poles require bracing. This can be done either by guy wires or

ropes, or by other poles or appliances anchored or planted at some distance from the pole, braced against the pole. These guy wires, ropes or bracing poles necessarily occupy a considerable portion of the right of way.

For many years the railroad company has operated in its business exclusively its own line of wires and poles also located on the right of way.

4. The aforesaid contract having terminated by reason of the expiration of the term specified therein, the railroad company, pursuant to the terms of the contract, on or about the sixteenth day of May, 1902, notified the Western Union Telegraph Company to remove its poles within six months from the first day of June, 1902. By virtue of the expiration of the term of twenty years specified therein, said contract was terminated and the Pennsylvania Railroad Company was at liberty to enter into such other contracts with such other telegraph companies as it should find necessary. It was necessary for it to enter into some contract by which it would be enabled to secure for itself requisite telegraph facilities for the proper conduct of its business not procurable solely through the use of its own line of telegraph wires and poles.

5. On or about the twenty-fifth day of June, 1902, it entered into a contract with the Postal Telegraph Cable Company, a corporation engaged in the business of interstate and other telegraphing similar to that conducted by the Western Union Telegraph Company, by means of which it reserved to itself the entire ownership and control of all the telegraph poles which shall be constructed upon the right of way, together with such additional telegraph facilities as it deemed necessary for its purposes. A copy of this contract, marked "Exhibit B" is hereto attached. Both of the parties thereto are about to enter upon the performance of its conditions.

Under this contract the railroad company will have the entire control of the location, erection and maintenance of telegraph poles upon the right of way, and will be enabled to shift the same
66 from time to time in such way and manner as it shall deem necessary in the proper conduct of its business of transportation.

The pecuniary benefits which will result to the railroad company from this contract will be large. It is difficut to estimate the same, but it is believed that the benefits it will derive under said contract, properly applicable to the portion of its system now sought to be appropriated by the Western Union Telegraph Company, will amount at once nearly to seventy-five thousand dollars per annum and that the value of such benefit will annually increase largely.

6. After receipt of the notice given to it, the Western Union Telegraph Company removed its instruments from the depots and stations of the railroad company and is now doing its business in other places by it established near the same.

7. I believe, and therefore aver, that the Western Union Telegraph Company could readily have made, after the receipt by it of

notice of removal, such other arrangements as would have enabled it to conduct its whole business fully and completely by means of wires and poles located outside of the railroad right of way.

I aver that there is no necessity for any appropriation by the Western Union Telegraph Company of any portion of the right of way of the railroad company. It can transact its whole business of telegraphing, interstate and within the State, without any appropriation of any portion of said right of way. Nearly all, if not all, the cities and towns located along the system of the Pennsylvania Railroad Company in the State of New Jersey are connected by roads and highways along which the Western Union Telegraph Company has either already directly or through its affiliated companies, erected lines or wires or poles, or along which it can erect the same at no extraordinary expense. If it possesses the right of eminent domain which it claims for itself or for its affiliated or controlled companies, it can easily procure such right of way as does not exist along said roads and highways.

I believe, and therefore aver, that the Western Union Telegraph Company is now able to inaugurate, with little or no delay and with no extraordinary expense, a line or lines of wires and poles amply sufficient for all its purposes.

I believe, and therefore aver, that one of the purposes of its present proceeding is to embarrass the Pennsylvania Railroad Company,
67 which has severed its contract relations with it, in carrying out the contract it has entered into and which it has been necessary for it to enter into with the Postal Telegraph Cable Company.

8. The Postal Telegraph Cable Company, upon the removal by the Western Union Telegraph Company of its line of poles now located upon the right of way of the railroad company, will be enabled at once to do for the Pennsylvania Railroad Company the business of telegraphing necessary for the latter, over the wires which it will string upon the poles the Pennsylvania Railroad Company is ready to erect immediately.

If the doing of what is necessary to carry out the contract with the Postal Telegraph Cable Company be interfered with or delayed, very great injury will result to the railroad company and it will be put to very great inconvenience in and about the transaction of its business.

It is necessary to construct the new line of poles required to be constructed under the said contract with the Postal Telegraph Cable Company in about the same location as that of the line of poles belonging to the Western Union Telegraph Company which it has been notified to remove on or before the first day of December, 1902.

Outside of this location there is no other part of the right of way of the railroad company which can be used without most serious injury to its business. The construction of a line of poles and wires in any other than said location would deprive the railroad company

of the use of a portion of its right of way absolutely required by it for use, and by it in actual use, or absolutely needed for necessary use in the immediate future, in and about its business of transportation. Such construction would interfere with the ordinary travel on and transportation along said railroad.

9. The right of way belonging to the United New Jersey Railroad and Canal Company of its entire width, is absolutely necessary for it in and about its business, and is in actual use by it or absolutely needed for necessary use in the immediate future. No portion of said right of way can be devoted to any other purpose without great injury to it, or without interference with the ordinary travel, or without irreparable damage.

As I have already said, the railroad company requires for its purposes certain telegraph facilities additional to those possessed by it. These it can only procure by means of the additional line of wires and poles concerning which it has contracted with the Postal
68 Telegraph Cable Company. Both lines of poles, as I have said, should be in its own ownership and under its own control. In no other way can it properly insure such changes of location and construction as from time to time will be necessary. The location and construction of these two lines of wires and poles leave no space whatever upon the right of way which is not presently used or necessary to be used by it.

At many places the whole right of way is completely occupied by lines of tracks and the necessary intervening spaces. From time to time it will be necessary for the railroad company, in many other places, to increase the number of its tracks.

The appropriation to the use of a telegraph company of any portion of the right of way would hamper irretrievably the railroad company in the necessary straightening, changing and increasing of the number of its tracks.

From time to time during the last twenty years the railroad company has found the right of way entirely inadequate in width for its business purposes, and has been obliged to widen the same at a very great expense. It will doubtless be necessary for it in the future, from time to time, to acquire additional lands. Its present right of way is inadequate in many places for its present purposes, and will be increasingly inadequate from time to time in many additional places.

10. An injunction restraining the railroad company from compelling the removal by the Western Union Telegraph Company of its poles in accordance with the notice the latter has received, would prevent the carrying out at once of the Postal Telegraph Cable Company's contract, and would expose the railroad company to incalculable inconvenience in the transaction of its business.

11. It is more than probable that the railroad company from time to time will be able, only by securing a greater width of right of way by acquiring additional ground, to allow the continued location upon it of the line of wires and poles for which provision has been

made under the contract with the Postal Telegraph Cable Company.

12. There will be no room upon the two lines of poles which will be erected, one for the exclusive use of the railroad company and the other, under the contract with the Postal Telegraph Cable Company, for the wires of any other company.

13. At all places along the line of the Pennsylvania Railroad system between Jersey City and Trenton there are two tracks. At most places there are four, and in many places a considerably greater number. The width of the track is about four feet, eight
69 inches; for safe railroad business there must be between and on each side of each line of track, a space of seven feet, and all new construction provides for eight feet.

CHAS. E. PUGH.

Sworn and subscribed before me, a notary public of the Commonwealth of Pennsylvania residing in the city of Philadelphia, this 17th day of December, 1902.

HIRAM H. POTTS,
Notary Public.

Commission expires February 26th, 1905.

"EXHIBIT A."

(288 A.)

Agreement between the Pennsylvania Railroad Company and the Western Union Telegraph Company, dated September 20th, 1881.

This agreement, made the twentieth day of September, anno Domini one thousand eight hundred and eighty-one, between the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, hereinafter for brevity designated as the railroad company, and the Western Union Telegraph Company, a corporation of the State of New York, hereinafter for brevity designated as the telegraph company, witnesseth:

First. Said railroad company hereby grants, to the extent of its corporate power so to do, to the said telegraph company, a right to place, maintain and use upon the line of the right of way of the Pennsylvania railroad, and of the railroads owned, operated, or leased by it, or in which it is otherwise interested, as enumerated in the schedule hereto attached, marked "A," and made part of this agreement, a single line of telegraph poles, except where two are hereinafter authorized, with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company, or such

other officer as the railroad company may designate for that
70 purpose: *Provided*, That the location of any of the telegraph company's poles shall, from time to time, be changed from one point to another on the railroad right of way at the expense of the telegraph company, in such manner as the general manager, or other proper officer of the railroad company may direct, so as not to interfere with the operations of the railroad: *Provided, however*, That the telegraph company shall have the right to maintain two lines of poles and such number of wires as it may deem necessary, on the south side of the main line of the railroad company's railroad between Jersey City and West Philadelphia, it being understood that the railroad company may require and permit the telegraph company either to put its wires under the railroad right of way, or remove them from said right of way through the various cities, towns or villages, or any of them, between West Philadelphia and Jersey City, including both of those cities, the telegraph company reserving the right to elect whether it shall put its wires under the railroad right of way or transfer them to other routes. The telegraph company shall have the right to maintain, renew and repair its underground line now running through the property of the railroad company in Jersey City. And should additional corporate action upon the part of any of the corporations controlling the roads named in "Schedule A," hereto attached, be necessary to cover the lines therein named, the railroad company will also endeavor to procure such corporate action upon the part of such corporations.

Second. Said railroad company also grants to said telegraph company the right to lay down and maintain submarine cables, and to connect the same on the shores of any stream with the land poles or wires of the telegraph company, on the rights of way and grounds of the railroad company, in such locality, and in such manner, under the direction of the general manager aforesaid, or such other officer as the railroad company may designate for that purpose, as shall not interfere with the operations of the railroad.

Third. Said railroad company reserves to itself the option of determining whether the telegraph company may place a wire or wires, in addition to those provided for in the seventh clause hereof, upon the poles of the railroad company, upon any or all of the lines embraced in said schedule, the telegraph company agreeing that if such privilege be granted to and availed of by it, it will pay to the railroad company for the same, four dollars per mile per annum for each wire placed in pursuance thereof.

71 Fourth. The railroad company agrees to transport to and from regular stations, free of charge, over said lines of railroad embraced in this contract, the officers and employés of the telegraph company when engaged in building and repairing, equipping and operating the telegraph lines and wires hereby authorized upon said railroads, and also to transport free of charge to regular stations over said railroads the material to be used in the building or repairing, equipping or operating of said telegraph lines and wires herein au-

thorized to be constructed, maintained or operated on the railroads named in Schedule A; the telegraph company hereby agreeing that it will hold harmless and indemnify the said railroad company against all responsibility for damages, costs, or expenses that may be incurred or recovered for any injury by accident or otherwise to any person or property transported free under the terms of this agreement.

Fifth. The railroad company agrees that it will not hereafter grant the right to any other party or telegraph company to erect, maintain, or use poles or wires upon the right of way, or the buildings, bridges, or other structures or fixtures connected with the right of way of any of the railroads embraced in this agreement, unless such other party or telegraph company shall pay annually for such right in money an amount equal to the total annual money compensation herein agreed to be paid by the telegraph company, to wit, seventy-five thousand dollars per annum. If under the terms of this agreement, the railroad company shall hereafter grant to any other party or telegraph company the right to erect poles with wires thereon, the railroad company shall have the right, anything in this agreement contained to the contrary notwithstanding, to make the same terms, or terms which in the opinion of the railroad company's board of directors will be equally favorable, with such party or telegraph company, as to receiving and transmitting messages for the public, as are made with the Western Union Telegraph Company in the ninth article of this agreement. The provisions of this section not to apply to underground lines of wire.

Sixth. The telegraph company agrees to pay annually to the railroad company during the continuance of this agreement for the privileges granted in the first and second clauses hereof, whether the same be availed of or not, the sum of seventy-five thousand dollars ($75,000) in monthly installments of six thousand two hundred and fifty dollars ($6,250) each, upon the twentieth day of each month, the year to begin on the twentieth day of September, 1881,
and the first payment to be made on the twentieth day of
72 October, 1881, and also to sell, transfer and deliver over to the
railroad company as an additional compensation for the privileges hereby granted, the entire line of poles as it now exists on the north side of the railroad company's railroad, between Jersey City and Kensington (except through Marion, East Newark, Newark and Rahway), and also six of the best number eight or nine gauge continuous wires now upon said poles, and on the poles of the telegraph company through said excepted places, and two additional like wires upon the poles of said telegraph company on the south side of said road from Philadelphia to Jersey City, the existing poles and wires so to be delivered to the railroad company, being of an estimated value of forty-one thousand dollars ($41,000), with the agreement that any wires in excess of the six wires upon the poles on the north side of said road so to be transferred to the railroad company shall remain thereon until they can be removed by the

telegraph company, which shall not be later than one year from date: *Provided, however*, That the telegraph company may leave and continue on said poles two wires, as provided for in section seventh.

Seventh. The telegraph company hereby grants the right to the railroad company to place two of its wires upon the poles and in the cable-houses of the telegraph company without charge and also the right to place, from time to time, additional wires necessary for the business of the railroad company upon any of the poles and in the cable-houses of the telegraph company on said lines of railroad, upon the payment by the railroad company of four dollars per mile per annum for each of such additional wires; and the railroad company hereby grants the right to the telegraph company to place two of its wires upon the poles and in the cable-houses of the railroad company without charge. The telegraph company will furnish at cost, or the railroad company may furnish at its own expense, cable conductors for connection with the railroad company's wires,

Eighth. The telegraph company agrees to transmit over its wires for the railroad company, during the continuance of this agreement with the same promptness, efficiency and dispatch as it does for any other party, for the sum of fifteen thousand dollars ($15,000) per annum, payable in equal monthly installments of one thousand two hundred and fifty dollars ($1,250) each, all messages pertaining to the business of said railroad company, or of any of the companies whose lines are included in Schedule A and covered
73 by this agreement, or any message relating to its business sent by an officer of either company as embraced in said schedule, to and from all points on the lines of said telegraph company throughout the United States and the British provinces, now erected or which may hereafter be erected, as well as upon any lines which the said telegraph company may now or hereafter during the continuance of this agreement secure the use of by purchase, lease, or otherwise in the United States or the British provinces.

The transmission of messages for the railroad company or any of the companies whose lines are included in Schedule A, and the transportation of employés of the telegraph company, as hereinbefore provided, shall be authorized by franks or passes to be issued by each party to the other, upon application of a properly authorized officer of the party requiring such service.

Ninth. At all telegraph stations of the railroad company, upon the lines of said railroads, the railroad company shall, at its option, have the right to receive, transmit, and deliver messages for the public, and if such messages be sent over the telegraph company's wires—the right so to forward them being hereby given to the railroad company—it shall be at the tariff rates of the telegraph company. The operators of the railroad company receiving, forwarding, and delivering messages so interchanged between the telegraph company's and the railroad company's lines, shall be considered as acting as the agents of the telegraph company, and such operators shall remit all receipts for such messages to the telegraph company, which

company shall furnish to the railroad company a monthly statement thereof, and the telegraph company agrees to pay monthly to the railroad company one-half of the cash receipts for such service, after deducting all tolls on ocean cable messages and tolls belonging to lines of other companies paid on such messages, which shall be retained in full by the telegraph company. If the railroad company grant the right to any other telegraph company to have an office or offices in any of the depots or buildings of the railroad company, the same privilege in the same depot or building shall be granted to the Western Union Telegraph Company on as favorable terms and with as favorable location as shall be granted to said other company.

Tenth. The railroad company shall have the right to the free use of any telegraphic patent rights, or new discoveries, or inventions that the telegraph company now owns, uses, or controls in its general telegraph business, or which it may hereafter own, use, or
74 control as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

Eleventh. The telegraph company agrees that, as a part of the service for which it is to receive the allowance of fifteen thousand dollars ($15,000) under article eighth of this agreement, it will receive and transmit cable dispatches on the business of any of said railroad companies to Europe and other foreign countries, aggregating at current rates the sum of one thousand dollars ($1000) per annum, the railroad company agreeing to pay any excess on cable messages over that amount in each year.

Twelfth. Neither the general terms of this agreement, nor any stipulation contained herein, shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the railroad company, or any other company whose action it may procure, and in favor of the telegraph company, as against the owner of the fee simple of the land over which the railroad or other company has the right of way, nor as against the exercise of the power of eminent domain upon the part of any other company possessing it by grant from the Commonwealth or State creating such corporation: *And it is further agreed*, That if anything herein contracted to be done, or not to be done, shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of an excess or defect of corporate or legal authority in so doing.

Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their successors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing: *Provided*, That if before the expiration of said twenty years the railroad company shall, from any cause, cease to own, operate or control any or either

of the railroads enumerated in Schedule A, without having procured the corporate assent to this agreement of the proprietary corporation, this agreement shall become inoperative as to such railroad or railroads after the railroad company shall cease to own, operate or control the same, and in such event, the annual payment provided for in the sixth section hereof shall be reduced in such proportion not exceeding the mileage of the railroad or railroads so ceased to be owned, operated or controlled, as may be agreed upon between the parties hereto; and in case they cannot agree, such proportion as may be fixed by the arbitrators as per article eighteenth of this agreement.

75 Fourteenth. It is a condition of this agreement that the railroad company is not to be responsible for, and the telegraph company hereby covenants and agrees to save the railroad company harmless, and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company, while being carried free over any of said railroads under this agreement; and the telegraph company shall not be responsible for, and the railroad company agrees to indemnify and save harmless the telegraph company against any loss or damages of any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the railroad company under this agreement.

The telegraph company hereby assumes all responsibility for damages resulting from errors, failures, delays, or other defaults or mishaps in the transmission or delivery of messages occasioned by the fault of persons employed directly by it; and the railroad company hereby agrees to pay one-fourth (¼) the amount of any damages, costs, or legal expenses which may be recovered against or incurred by the telegraph company on account of any errors, failures, delays, or other defaults or mishaps in the receipt, transmission, or delivery of messages, occasioned by the fault of persons employed by the railroad company, and acting as agents of the telegraph company, in the transaction of commercial or public telegraph business, the telegraph company agreeing to pay the remaining three-fourths (¾).

Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered to the treasurer, or an executive officer of the party in default, or if any other covenant herein made shall not after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party the contract may, at the option of the party demanding such fulfillment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due or for damages for non-fulfillment of such covenant or of any other covenant.

Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at

any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said
76 notice all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: *Provided, however*, That the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same.

Seventeenth. All and all manner of contracts, engagements or arrangements whatsoever, hitherto made between the said railroad company or any of the companies named in Schedule A hereto attached, or any company merged or consolidated with the companies therein named and the said telegraph company or any other company or companies, whose stock or lines may be owned or controlled by said telegraph company or made with other telegraph companies or individuals, and assigned and transferred to or owned or claimed by said telegraph company for or in respect to the right of way over the railroads embraced in the schedule hereto attached, are hereby canceled and declared to be void and of none effect as between the parties hereto and thereto, and all manner of claims arising thereout, whether in suit or otherwise, are hereby terminated and settled, and the parties mutually released therefrom, and the parties complainants in any such suits agree to discontinue the same, each party agreeing to pay its own costs. This not to release any money actually due by either party to the other for rent or services rendered under said contracts.

Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination.

Eighteenth. In case of any difference of opinion between the parties hereto in relation to any of the provisions of this agreement, the matter in dispute shall be referred to two arbitrators, one of whom shall be appointed by the railroad company and the
77 other by the telegraph company, and if the two referees so chosen cannot agree, then the two so selected shall select a third like disinterested and competent party, and the decision of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto; but if either of the parties hereto fail or refuse after ten days' written notice from the other to

select a referee as aforesaid, then the party not in default shall select a referee as aforesaid for the party so failing or refusing to select, and the said two referees so selected if unable to agree shall select a third like referee, and the three so chosen, or a majority of them, shall proceed as hereinbefore mentioned, and the award of the said three referees, or a majority of them, shall be final and conclusive between the parties hereto.

In witness whereof, the parties to these presents have caused the names of their respective presidents to be hereunto subscribed and their corporate seals to be attested, the day and year first above written.

THE PENNSYLVANIA RAILROAD COMPANY,
By G. B. ROBERTS, *President.*

[Seal of the Penna. R. R. Co.]

Attest: JNO. C. SIMS, JR., *Secretary.*

THE WESTERN UNION TELEGRAPH CO.,
By NORVIN GREEN, *President.*

[Seal of the W. U. Tel. Co.]

Attest: A. R. BREWER, *Secretary.*

SCHEDULE A.

Philadelphia and Columbia railroad—West Philadelphia to Columbia, Pa.
Pennsylvania railroad—Harrisburg to Pittsburg, Pa.
Schuylkill River branch Pennsylvania railroad—Haverford street to Arsenal bridge.
Delaware extension Pennsylvania railroad—Arsenal bridge, West Philadelphia, to Dock Street depot.
Frazer branch—Frazer to near Woodland.
78 Columbia bridge—Over Susquehanna river at Columbia, Pa.
York branch—West end Columbia bridge to York, Pa.
Tyrone branch—Tyrone to junction Bald Eagle Valley railroad at Vail Station.
Hollidaysburg branch—Altoona to Hollidaysburg, with branch from Duncansville to Portage iron works.
Morrison's Cove branch—Hollidaysburg to Henrietta, Pa., with branch to Martinsburg.
Bloomfield branch—Roaring Spring to Ore Hill, Pa.
Williamsburg branch—Hollidaysburg to Williamsburg, Pa.
Springfield branch—Springfield Junction to ore mines.
Indiana branch—Blairsville intersection to Indiana, Pa.
Port Perry branch—Pennsylvania railroad near Brinton's, to Pittsburg, Virginia and Charleston railway at Thomson.

Hudson River ferries—New York city to Jersey City, across Hudson river.

New Jersey railroad—Hudson river, at Jersey City to point 3½ miles west of New Brunswick, N. J., with branches from Harsimus Junction to pier No. 3; East Newark to Market street, Newark, and Metuchen to Bonhampton.

Trenton branch Camden and Amboy railroad—3½ miles west of New Brunswick to east end of Trenton Delaware bridge, with branches from Princeton Junction to Princeton, and Monmouth Junction to Kingston.

Perth Amboy and Woodbridge railroad—Railway to Perth Amboy, N. J.

Millstone and New Brunswick railroad—New Brunswick to East Millstone, N. J.

Rocky Hill and Kingston railroad—Kingston to Rocky Hill, N. J.

Camden and Amboy railroad, main line—Camden to South Amboy, with branches from Bordentown to Trenton, and Jamesburg to Monmouth Junction.

Pemberton and Hightstown railroad—Pemberton to Hightstown, N. J.

Burlington and Mt. Holly railroad—Burlington to Mt. Holly, N. J.

Mt. Holly, Lumberton and Medford railroad—Mt. Holly to Medford, N. J.

Camden and Burlington County railroad—Camden to Pemberton, N. J.

Vincentown branch of Burlington County railroad—Ewansville to Vincentown, N. J.

79 Belvidere Delaware railroad—Trenton to Manunka Chunk, with branch from Coalport to Millham.

Flemington railroad—Lambertville to Flemington, N. J.

Trenton Delaware bridge—Over Delaware river, from Trenton, N. J., to Morrisville, Pa.

Philadelphia and Trenton railroad—West end of Trenton Delaware bridge, at Morrisville, Pa., to Kensington Station, Philadelphia, with branch on Tioga street to Delaware river.

Frankford and Holmesburg railroad—Holmesburg Junction to Bustleton, Pa.

Connecting railway—Philadelphia and Trenton railroad at Frankford Junction, to Mantua Junction, on Pennsylvania railroad.

West Chester railroad—Near Woodland to West Chester, Pa.

East Brandywine and Waynesburg railroad—Downingtown to New Holland, Pa.

Pomeroy and State Line railroad—Pomeroy, Pa., to Philadelphia, Wilmington and Baltimore Railroad intersection, Del.

Hanover and York railroad—York to Hanover, Pa.

Littlestown railroad—Hanover, Pa., to Maryland State line, near Kingsdale.

Frederick and Pennsylvania Line railroad—State line, near Kingsdale, to Frederick, Md.

Harrisburg, Portsmouth, Mt. Joy and Lancaster railroad—Dillerville to Harrisburg, with branch from Middletown to Columbia, Pa.

Philadelphia and Erie railroad—Erie to Sunbury.

Sunbury, Hazleton and Wilkesbarre railroad—Sunbury to Tomhicken, Pa.

Mifflin and Centre County railroad—Lewistown Junction to Milroy, Pa.

Lewistown and Tuscarora bridge—Over Juniata river, at Lewistown, Pa.

Sunbury and Lewistown railway—Lewistown borough to Selinsgrove Junction, N. C. railway.

Bedford and Bridgeport railroad—Mt. Dallas, Pa., to Maryland State line, with branch on Dunnings creek.

Bald Eagle Valley railroad—Vail Station to Lock Haven, Pa.

Tyrone and Clearfield railway—Vail Station to Curwensville, Pa., with branches to coal mines.

80 Lewisburg and Tyrone railroad—Tyrone to Pennsylvania furnace, and Montandon to Spring Mills.

Lewisburg bridge—Over Susquehanna river at Lewisburg, Pa.

Newry railroad—Portage iron works to Newry, Pa.

Ebensburg and Cresson railroad—Cresson to Ebensburg, Pa.

South-west Pennsylvania railway—Junction, near Greensburg, to Fairchance, Pa., with branches to coal mines.

West Pennsylvania railroad—Blairsville to Allegheny City, with branch to Butler, Pa.

Pittsburg, Virginia and Charleston railway—South side, Pittsburg, to Belle Vernon.

Freehold and Jamesburg Agricultural railroad—Jamesburg to Sea Girt, N. J.

Pemberton and Sea Shore railroad—Pemberton Junction to Whiting's, N. J.

Columbus, Kinkora and Springfield railroad—Kinkora to New Lisbon, N. J.

Florence Branch railroad—Florence, N. J., to Wood's iron works.

Camden and Philadelphia steamboat ferry—Camden, N. J., to Philadelphia.

West Jersey railroad—Camden to Cape May, N. J., with branch from Glassboro to Bridgeton.

West Jersey and Atlantic railroad—Newfield to Atlantic City.

Swedesboro railroad—Woodbury to Swedesboro, N. J.

Salem railroad—Elmer to Salem, N. J.

Columbia and Port Deposit railroad—Columbia, Pa., to Port Deposit, Md.

Cumberland Valley railroad—Harrisburg to Potomac river, at Powell's Bend, Md.

Dillsburg and Mechanicsburg railroad—Mechanicsburg to Dillsburg, Pa.

Mont Alto railroad—Junction near Chambersburg, to Waynesboro, Pa.

Southern Pennsylvania railroad—Junction near Marion, to Richmond, Pa.

Martinsburg and Potomac railroad—Potomac river, at Powell's Bend, to Martinsburg, W. Va.

Northern Central railway—Baltimore, Md., to Sunbury, Pa., with branches to Green Spring and Canton, Md.

Elmira, Jefferson and Canandaigua railroad—Watkins to Canandaigua, N. Y.

81 Chemung railroad—Horse Heads Junction, Erie railway, to Watkins, N. Y.

Elmira and Williamsport railroad—Williamsport, Pa., to junction with Erie railway, near Elmira, N. Y.

Shamokin Valley and Pottsville railroad—Sunbury to Mt. Carmel, Pa., with branch to Hickory Ridge colliery.

Summit Branch railroad—Millersburg to Williamstown, Pa.

Baltimore and Potomac railroad—Baltimore, Md., to south end Long bridge, Washington, D. C., with branch from Bowie to Pope's creek.

Alexandria and Washington railroad—South end Long bridge to Alexandria, Va.

Alexandria and Fredericksburg railroad—South end Long bridge to Quantico, Va.

Bellefonte and Snow Shoe branch—Milesburg to Bellefonte, Pa.

Allegheny Valley railroad—Pittsburgh to Oil City, and Red Bank to Driftwood, with branches.

"EXHIBIT B."

(795.)

Agreement between Postal Telegraph-Cable Company and the Pennsylvania Railroad Company, dated June 25th, 1902, for the transaction of a commercial telegraph business over the railroad lines named herein.

This agreement, made and entered into this twenty-fifth day of June, 1902, by and between the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York, party of the first part, and the Pennsylvania Railroad Company, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, party of the second part, hereinafter for convenience referred to as the telegraph company, and the railroad company, respectively, witnesseth:

Whereas, the telegraph company operates a telegraph system throughout the United States, and

82 Whereas, the railroad company owns, maintains and operates or controls the lines of railroad more particularly de-

scribed in the exhibit marked Schedule A, hereto attached and made a part hereof, and

Whereas, the telegraph company desires the privilege of transacting a commercial telegraph business on and over the lines of railroad of the railroad companies specified in said Schedule A on the terms and conditions hereinafter stated.

Now, therefore, in consideration of the premises and of the covenants and undertakings hereinafter contained on the part of each party to be kept, observed and performed, and for other valuable considerations moving from each of the parties hereto to the other, receipt whereof is hereby acknowledged by each of them, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows:

I. The railroad company hereby grants to the extent of its corporate power so to do to the telegraph company during the period covered by this agreement, the privilege of transacting a commercial telegraph business on and over the lines of railroad of the railroad companies specified in said Schedule A, but the easement herein granted is confined to the transaction of commercial telegraph business only and does not cover the right to furnish or transact telephone service for the public.

For the purpose of enabling the telegraph company to transact commercial telegraph business, the railroad company agrees to furnish upon the rights of way of the lines of railroad named in Schedule A the necessary poles, cross-arms and brackets to which the telegraph company may at its own cost and expense attach in the aggregate not exceeding twelve thousand (12,000) miles of wire, the telegraph company to furnish the said wire, and all necessary insulators therefor, and to make all renewals thereof, the railroad company agreeing to keep said poles in repair, and to furnish the necessary labor to keep said wires in ordinary repair, the telegraph company furnishing the necessary material and insulators therefor. The stringing, renewal and removal of said wires are to be so done as not to interrupt or interfere with the proper working of the railroad company's wires.

II. The telegraph company hereby agrees that it will during the period covered by this agreement efficiently transact a commercial telegraph business on and over the railroads of the said railroad companies. At such points as the railroad company may elect from time to time, the operators of the railroad company will
83 transact commercial telegraph business, acting as the agents, and conforming to the rules, regulations and instructions of the telegraph company in the transaction of such commercial telegraph business in so far as they do not conflict with the rules, regulations and instructions of the railroad company, said operators being paid by the railroad company.

III. The telegraph company shall determine all questions of tariff and shall fix all rates for said commercial telegraph business to and from offices on the telegraph lines of the railroad company, it being

understood and agreed, however, that said rates shall in all cases be the same as the rates of other competing telegraph companies, except when the parties hereto shall mutually agree in writing to establish a higher or a lower rate.

IV. For the rights and privileges granted to the telegraph company by this agreement, it is agreed and stipulated that, in addition to all payments required by article VIII of this agreement, the railroad company shall also be entitled to receive payments, which the telegraph company shall make, as follows:

(1.) A sum equal to the total tolls and revenue derived from all such commercial telegraph business between railroad company's offices as shall be wholly conducted over wires supplied and owned by the railroad company, and transacted by such operators of the railroad company as shall also be agents of the telegraph company as provided in article II hereof.

(2.) A sum equal to fifty per centum (50%) (except as otherwise provided in section 4 of this article) of the total tolls and revenue derived from all commercial telegraph business (other than that specified in section one of this article), including market quotations, newspaper matter and transatlantic cable messages, whether originating at said railroad company's offices and destined to points beyond said railroad company's lines, or originating beyond said lines and destined to said railroad company's offices; or originating at or delivered from the offices or trains of the railroad company and delivered to the separate offices of the telegraph company upon said railroad company's lines, or originating at such separate offices of the telegraph company and destined to said railroad company's offices, which shall remain after deducting from said total tolls the amount which said telegraph company shall be required to pay, or account for, to other connecting lines.

(3.) The telegraph company may maintain and operate independently of the railroad company the telegraph company's offices in the cities and towns named in Schedule B attached hereto, but
84 it agrees that it will not during the continuance of this agreement operate in any other city or town on the lines of railroad of the railroad company an office independent of the railroad company, except with the approval of the railroad company.

It is further understood and agreed, however, that if the telegraph company shall not desire to maintain any or all of its offices now or hereafter established in any of said cities or towns named in Schedule B, it shall have the right to close any or all of said offices, provided, however, that if the telegraph company elects to maintain no offices in any of said cities or towns, it shall give the railroad company thirty (30) days' written notice of its intention to close its separate office or offices in said place. After the expiration of said thirty days the commercial telegraph business shall be both transmitted and delivered through the railroad company's office or offices at said place in accordance with this agreement if the railroad company so desires and has the necessary facilities therefor, and the telegraph company

shall not re-establish an office in said city or town except upon the terms and conditions hereinabove set forth. The telegraph company agrees that it will not except with the approval of the railroad company establish in any of the cities or towns named in Schedule B an office independent of the railroad company within the immediate vicinity of any of the railroad company's stations or offices where commercial telegraph business is transacted under this agreement where the establishing of such office would be likely to detract from the receipts of said office of the railroad company.

(4.) It is further covenanted and agreed that at Jersey City, Philadelphia, Pittsburg, Washington, Baltimore, Harrisburg, and at such other points as may hereafter be agreed upon, the railroad company will furnish at its own expense in its main passenger station the necessary space, heat, and light for the proper accommodation of a telegraph office for the transaction of commercial telegraph business. At such offices the telegraph company will transact a commercial telegraph business at its own expense, paying as rental to the railroad company 40% of the total tolls on all commercial telegraph business transacted at such offices after deducting the amount which the telegraph company shall be required to pay or account for to other connecting lines.

(5.) On or before the twentieth (20th) day of each month, statements shall be prepared showing all commercial telegraph
85 business transacted under this agreement during the preceding calendar month where the revenue therefrom is to be divided between the railroad company and the telegraph company, and such revenue shall be divided between the parties hereto as hereinbefore provided, and any balance due from either party to the other paid within thirty (30) days thereafter.

V. The telegraph company shall and will at its own expense advertise such offices on the telegraph lines of said railroad company as may be agreed upon as aforesaid, as part of the telegraph company's general system, and shall also at its own expense furnish proper and suitable signs, message blanks and all other forms necessary for the proper transaction of the commercial telegraph business at said offices, and said railroad company agrees that said blanks and forms shall be used and signs displayed at all telegraph offices on its lines at which commercial telegraph business is transacted for the purpose of identifying the commercial telegraph business done at said offices with the said telegraph company's system.

VI. It is understood and agreed that the wires which the railroad company may assign for commercial telegraph business shall be connected into the main offices of the telegraph company at the telegraph company's expense wherever and whenever such connections are necessary or desirable for the efficient interchange of commercial telegraph business between the parties hereto. Where desired by the railroad company, the telegraph company will give the railroad company the free use of its pole lines or underground lines necessary to enable the railroad company's wires to be connected into the

railroad company's offices located in the different cities on its lines or to connect the railroad company's wires into city offices of the telegraph company. The telegraph company agrees to furnish at its own expense the instruments, local batteries and operators necessary at its offices for the proper operation of the railroad company's wires so connected and when said wires terminate in offices of the telegraph company will furnish free the main battery necessary at such offices for the proper operation of said railroad company's wires so terminating. It is further understood and agreed that in the absence of other arrangements between the parties hereto, the interchange point for commercial telegraph business originating at such railroad company's offices and destined to points beyond the said railroad company's lines, or originating beyond said lines and destined to said railroad company's offices, shall be the telegraph
86 office of the railroad superintendent of the division on which the business originates or to which it is destined.

VII. (1.) All messages of the officers, agents and employés of the railroad company pertaining to business of the railroad company between the railroad company's offices shall be transmitted on the wires used by the railroad company.

(2.) The telegraph company agrees to receive, and transmit, over its wires, and deliver, free of charge, for the railroad company during the continuance of this agreement, with promptness, efficiency and dispatch, all messages pertaining to the business of the Pennsylvania Railroad Company or any of the companies whose lines of railroad are included in Schedule A and covered by this agreement, or any messages relating to its business sent by an officer of any company embraced in said schedule, to and from all points on the land lines now or hereafter controlled by it up to the amount of $100,000.00 each year, computed at the regular tariff rates of the telegraph company between the points of origin and destination, the transmission of such messages to be covered by franks or passes to be issued on the application of a duly authorized officer of the Pennsylvania Railroad Company, and the railroad company agrees to pay one-half the regular rates on such messages above the sum of $100,000.00 in each year, the railroad company hereby agreeing to hold harmless and indemnify the telegraph company against loss or damage of any kind arising from any error or failure in the transmission or delivery of messages sent free by the telegraph company for the railroad company under this agreement. Itemized monthly accounts shall be rendered by the telegraph company of such free and half rate messages.

(3.) The telegraph company agrees that, in addition to the free service to be performed by it, under section (2) of this article, it will receive and transmit cable dispatches on the business of any of said railroad companies to Europe and other foreign countries, aggregating at current rates the sum of one thousand dollars per annum, the railroad company agreeing to pay any excess on cable messages over that amount in each year.

(4.) The railroad company agrees to transport to and from regular stations, free of charge, over said lines of railroad embraced in this contract, the officers and employés of the telegraph company when engaged in building and repairing, equipping and operating the telegraph wires hereby authorized upon said railroads, and also to transport free of charge to regular stations over said railroads the material to be used in the building or repairing, equipping or operating of said telegraph wires herein authorized to be constructed, maintained, or operated on the railroads named in Schedule A, up to the sum of $20,000.00 per annum, but should such transportation exceed the sum of $20,000.00 per annum, the telegraph company shall pay the railroad company one-half its regular rates on all transportation above that sum, the telegraph company hereby agreeing that it will hold harmless and indemnify the said railroad company against all responsibility for damages, costs or expenses that may be incurred or recovered for any injury by accident or otherwise to any person or property so transported under the terms of this agreement. The transportation of employés of the telegraph company to be covered by passes or special tickets to be issued on the application of a duly authorized officer.

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VIII. (1.) In consideration of the provisions of this agreement and the privileges hereinbefore granted by the railroad company, the telegraph company agrees in addition to the other payments herein required to be made by it to pay as a rental to the railroad company, in monthly installments on the first day of each month in each and every year during the continuance of this agreement, the minimum sum of $60,000.00 per annum for the first five years from the date of this agreement, the minimum sum of $70,000.00 per annum for the second five years, and the minimum sum of $80,000.00 per annum for the third five years of the period of this agreement.

(2.) It is further covenanted and agreed in order that the railroad company may properly provide the necessary accommodation for the 12,000 miles of wire to which the telegraph company is entitled under this agreement, that the telegraph company shall and will furnish the railroad company a statement showing the number of wires amounting in the aggregate to 12,000 miles and between what points they desire to erect the same, and should the railroad company be unable to accommodate the designated number of wires between the points named on its present lines of poles it shall provide and locate such additional poles as may be necessary for this purpose. After the railroad company has provided the necessary pole accommodation for the said 12,000 miles of wires between the points designated by the telegraph company, no change in the location of said wires (except as provided in section XVI for the removal of said wires) shall be made without permission from the railroad company, and should the telegraph company desire more than 12,000 miles of wire on the poles of the railroad company and the railroad company be in position to provide for the

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same at a proper and reasonable cost with due regard to efficiency and economy of operation, the railroad company will furnish accommodation for such additional wires upon said poles, the telegraph company paying therefor a yearly rental of $4.00 per mile per wire and $2.00 per mile per wire per year for maintenance.

(3.) The telegraph company agrees that it will indemnify and save harmless the railroad company against any and all loss or damage to the property of the railroad company resulting from the construction, repair, reconstruction and maintenance of the telegraph company's wires upon the railroad company's rights of way and against all claims, payments, suits, judgments and sums of money accruing to any party against the railroad company for loss, damage or injury either to person or estate resulting from the acts or negligence of the telegraph company, its servants or employés, in and about the construction, repair, reconstruction, maintenance and operation of the telegraph company's said wires upon the rights of way of the railroad company.

IX. The telegraph company hereby assumes all responsibility for damages arising from the fault of persons employed directly by it, and also agrees to save the railroad company harmless against any and all claims for loss or damage resulting from errors, delays or other defaults in the transacting of commercial telegraph business under this agreement, and expense in connection therewith, except that wherefrom the railroad company receives a sum equal to the total tolls and revenue as provided in section 1 of article IV. hereof. The railroad company agrees that any such claims that may be brought against it shall be turned over to the telegraph company for defense, settlement or compromise as the telegraph company may elect, or that such claims, if defended, settled or compromised by the railroad company, shall be defended, settled or compromised subject to the approval of the telegraph company.

X. The telegraph company agrees not to use the premises of the railroad company for any purpose other than those specified in this agreement.

XI. The general terms and conditions of this agreement shall apply to all lines of railroad now or hereafter acquired or controlled by the railroad company as a part of its system east of Pitts-
89 burg and Erie, except so far as it may be inconsistent with existing contracts binding upon lines of railroad now controlled by the railroad company, and with contracts binding upon lines of railroad hereafter acquired by the railroad company and made before such acquisition. But should the railroad company hereafter acquire additional lines of railroad having contracts with the telegraph company, such lines of railroad shall, at the request of the railroad company, be brought under the general terms and provisions of this agreement.

XII. The railroad company shall have the right to the free use in connection with its general railroad telegraph business of any patent rights, or new discoveries, or inventions that the telegraph

company now owns, uses, or controls in its general telegraph business, or which it may hereafter own, use, or control as aforesaid.

XIII. It is understood and agreed that all commercial telegraph business transacted in the stations and offices, and delivered from the trains of the railroad company for the public shall come within the terms of this agreement and subject to the provisions thereof.

The division of tolls under existing agreements between the telegraph company and connecting companies is shown on Schedule C hereto annexed. It is understood and agreed that the division of tolls specified in any future agreements between the telegraph company and other parties shall be subject to the approval of the railroad company in so far as said division of tolls reduces the percentage to the railroad company under this contract of total tolls on any commercial telegraph business transacted by the telegraph company under said future agreements.

XIV. In the event of interruption at any point to all of the wires of the railroad company it is understood and agreed that the railroad company shall have the free use of one of the telegraph company's working wires until at least one of the railroad company's wires has been restored to working order.

XV. Should the railroad company hereafter determine that the safe, efficient and economical management of the telegraph wires upon its lines requires that the same should be placed in conduits and the poles be removed from its rights of way, and the same can be done without impairing the efficiency of the service performed by the telegraph company for the public, it shall have the right to so arrange for placing the wires of the telegraph company either in separate conduits or in conduits jointly with the wires of the railroad company, but should such determination not be satisfactory to the telegraph company, or should the parties hereto be unable to agree upon an equitable basis of compensation to be paid by the telegraph company for such facilities, or upon any modifications in this contract which may be necessitated thereby, any differences existing between said parties in reference thereto shall be determined by the arbitration of three competent and disinterested parties, one to be appointed by each, and the two so appointed to elect a third, and the decision of a majority thereof to be final.

XVI. This agreement shall be in full force and effect for the term of fifteen (15) years from the first day of July, 1902, and shall then absolutely terminate without notice unless at least one year before such first day of July, 1917, provision shall have been made for its extension by the written agreement of the parties hereto.

It is understood and agreed that the telegraph company shall have the right at any time during the life of this agreement to remove any part or all of its said wires erected upon the rights of way of the railroad company under the terms of this agreement. If however the wire thus removed is a portion of the original 12,000 miles, the railroad company shall not be required to make pro-

vision for its attachment elsewhere. At the expiration of this agreement the telegraph company shall remove within three months thereafter all of its wires and fixtures then erected upon the railroad company's rights of way, and if not so removed the railroad company may remove them at the expense of the telegraph company; or the railroad company shall have the right to purchase from the telegraph company all or any portion of said wires and fixtures at their then value, to be determined by arbitration as provided in article XV. if the parties hereto cannot agree upon the same.

In witness whereof the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

POSTAL TELEGRAPH-CABLE COMPANY,
By WM. H. BAKER, [CORPORATE SEAL.]
Vice-President.

Attest: CHAS. P. BRUCH,
Ass't Secretary.

THE PENNSYLVANIA RAILROAD COMPANY,
By A. J. CASSATT, *President.* [CORPORATE SEAL.]

Attest: LEWIS NEILSON, *Secretary.*

91 SCHEDULE A.

United Railroads of New Jersey division.

From	To	Miles.	
Main line and branches.			
Phila. (35th St. Jc.), Pa	Jersey City, N. J	87.14	
Phila. (Frankford), Pa	Phila. (Kensington), Pa	2.84	
Trenton, N. J	Bordentown, N. J	6.10	
Princeton Jc., N. J	Princeton, N. J	3.11	
Monmouth Jc., N. J	Jamesburg, N. J	5.59	
Metuchen, N. J	Bonhampton, N. J	1.89	
Newark (Market St.), N. J	Harrison, N. J	1.47	
Jersey City (Bergen Hill), N. J	Jersey City, (Harsimus Cove), N. J	1.55	109.69
Camden & Amboy R. R. and branch.			
Camden, N. J	South Amboy, N. J	61.22	
Florence, N. J	Wood's iron works, N. J	2.17	63.39
Perth Amboy and Woodbridge R. R.			
Rahway (P. A. & W. Jc.), N. J.	Perth Amboy, N. J		6.40
Millstone and New Brunswick R. R.			
Millstone Jc., N. J	East Millstone, N. J		6.64
Rocky Hill R. R. and Kingston Branch United railroads.			
Monmouth Jc., N. J	Rocky Hill, N. J		6.54

From	To	Miles.	
Belvidere Delaware R. R. and branches.			
Trenton, N. J.	Manunka Chunk, N. J.	67.49	
Trenton (Coalport), N. J.	Trenton (Millham Jc.) N. J.	1.11	
Trenton (Coalport), N. J.	East Trenton, N. J.	1.67	
Lambertville, N. J.	Flemington, N. J.	11.55	
Martin's Creek, N. J.	Jc. with Bangor & Port. R. R.	0.29	82.11
Connecting railway lines.			
Phila. (Engelside), Pa.	Phila. (Thompson St.), Pa.	0.17	
Phila. (Germantown Jc.), Pa.	Phila. (Chestnut Hill), Pa.	6.75	
Phila. (Midvale Jc.), Pa.	Phila. (Midvale steel works), Pa.	0.85	
Phila. (3–10 m. east of Allen lane)	Fort Washington, Pa.	6.27	
Phila. (6–10 m. east of N. Penn Jc.)	Phila. (Cambria & "B" Sts.).	0.78	
Phila. (6–10 m. east of N. Penn Jc.)	Phila. (Oxford road), Pa.	3.55	
Phila. (Tioga St. Sta.), Pa.	Phila. (Jc. P. & T. R. R. east of Tacony), Pa.	5.13	
Phila. (Erie and Trenton Aves.), Pa.	Phila. (Frankford St.), Pa.	1.78	
Phila. (Holmesburg Jc.), Pa.	Phila. (Bustleton), Pa.	4.16	29.44
Delaware River R. R. and bridge and branches.			
Phila. (Frankford Jc.)	Pensauken Jc., N. J.	4.82	
East side Dela. riv. near Delair, N. J.	Fish House, N. J.	0.69	
East side Dela. riv. near Delair, N. J.	Morris Jc., N. J.	0.90	
Merchantville Jc., N. J.	Haddonfield Jc., N. J.	3.86	10.27
New York Bay R. R. and branches.			
Waverly (8–10 m. east of), N. J.	Crossing of Newark & Elizabeth Br. of C. R. R. of N. J.	2.20	
Waverly (8–10 m. east of), N. J.	Meadows Yard, N. J.	4.36	
Newark (1–10 m. east of Manfrs. R. R.), N. J.	Newark (Lister's Agl. Chem. Wks.), N. J.	0.67	
Newark (Passaic river), N. J.	Newark (terminus), N. J.	0.16	
Newark (¼ m. west of Emmet St.), N. J.	Newark (18th avenue), N. J.	2.05	9.44
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Freehold & Jamesburg Agricultural R. R.			
Jamesburg, N. J.	Sea Girt, N. J.		27.54
Columbus, Kinkora & Springfield R. R.			
Kinkora, N. J.	New Lisbon, N. J.		10.84
Camden & Burlington County R. R. and branch.			
Camden (Pavonia), N. J.	Pemberton, N. J.	22.46	
Burlington, N. J.	Mt. Holly, N. J.	7.15	29.61
Mt. Holly, Lumberton & Medford R. R.			
Mt. Holly, N. J.	Medford, N. J.		5.95
Vincentown Branch R. R.			
Evansville, N. J.	Vincentown, N. J.		2.84
Philadelphia & Long Branch R. R. and branches.			
Birmingham, N. J.	Bay Head Jc., N. J.	46.09	
New Lisbon (1 7–10 m. east of), N. J.	Brown's Mills-in-the-Pines, N. J.	1.80	
Island Heights Jc., N. J.	Island Heights, N. J.	1.18	49.07

From	To	Miles	
Philadelphia & Beach Haven R. R.			
Manahawkin, N. J	Beach Haven, N. J		12.69
Barnegat R. R.			
Barnegat City Jc., N. J	Barnegat, N. J		7.73

Pennsylvania Railroad division.

From	To	Miles.	
Main line and branches.			
Phila. (Broad S. Sta.), Pa	Pittsburg, Pa	352.15	
West Phila., Pa	Dock St., Phila., Pa	7.84	
Pollock and Swanson Sts., Phila., Pa.	Swanson and Morris Sts., Phila., Pa.	1.22	
Hamburg Jc., Phila., Pa	Girard Pt. and Pt. Breeze, Phila.	2.06	
Haverford St., West Phila., Pa	South St., West Phila., Pa	1.70	
Girard Point, Phila., Pa	Eleventh St., Phila., Pa	1.49	
Frazer, Pa	West Chester, Pa	6.82	
Glen Loch, Pa	Morrisville, Pa	45.64	
Conestoga Jc, Pa	Dillerville Jc., Pa	2.42	
Dillerville Jc., Pa	Branch Int., via Columbia, Pa.	29.50	
Columbia, Pa	South Columbia, Pa	0.53	
Tyrone, Pa	Vail, Pa	3.15	
Lilly, Pa	Coal mines, Pa	2.12	
Ben's Creek, Pa	Coal mines, Pa	1.61	
Sonman, Pa	Terminus, Pa	0.77	
Portage, Pa	Coal Tipple, Pa	3.63	
Ben's Creek, Pa	Summerhill, Pa	0.60	
Summerhill, Pa	South Fork, Pa	2.03	
Conemaugh, Pa	Johnstown, Pa	1.90	
Donohoe, Pa	Crabtree, Pa	8.12	
Jeanette, Pa. (Brush Cr. Br.)	Terminus, Pa	0.54	
Jeanette, Pa. (Bull Run Br.)	Terminus, Pa	0.71	
Manor, Pa	Claridge, Pa	4.30	
Irwin, Pa	Gratztown, Pa	10.19	
Stewart, Pa	Export, Pa	10.86	
Saunders, Pa	Terminus, Pa	3.87	
Stewart, Pa	Carnegie's Union R. R., Pa	5.90	
Fifty-second St., W. Phila., Pa	Pottsville, Pa	91.58	
West Manyunk, Pa	Pencoyd, Phila., Pa	1.28	
Phœnixville, Pa	Frazer, Pa	10.65	
Court St., Reading, Pa	Sixth St., Reading, Pa	0.98	
Pottsville, Pa	Primrose, Pa	7.49	623.25

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Downingtown & Lancaster R. R.			
Downingtown, Pa	Conestoga Jc., Pa		27.50
Pomeroy & Newark R. R.			
Pomeroy, Pa	Newark (Jc. with P. W. & B. R. R.), Del.		26.70
Lancaster & Reading Narrow Gauge R. R.			
Lancaster, Pa	Quarryville, Pa		15.21
Bedford & Bridgeport Ry.			
Mt. Dallas, Pa	Pa. and Md. State line	38.70	
Bedford, Pa	Holderbaum, Pa	10.47	49.17
Lewisburg & Tyrone R. R. (P. R. R. portion).			
Tyrone, Pa	Fairbrook, Pa	19.90	
Fairbrook, Pa	Scotia, Pa	5.30	
Juniata Jc., Pa	Juniata, Pa	2.08	27.28

From	To	Miles	
Bald Eagle Valley R. R. (P. R. R. portion).			
Vail, Pa.	Lock Haven, Pa.	[illegible]	
[illegible] Slow intersection, Pa.	Per Se, Pa.	[illegible]	
Sugar Camp Jc., Pa.	Lehigh Val. Coal Co.'s colliery, Pa.	6.77	
Grazer Branch Jc., Pa.	Tarumium, Pa.	[illegible]	
Milesburg, Pa.	Bellefonte, Pa.	[illegible]	[illegible]
Tyrone & Clearfield Ry.			
Vail, Pa.	Greenpoint, Pa.	[illegible]	
Osceola Jc., (Osceola Br.), Pa.	Terminus, Pa.	[illegible]	
Osceola Jc., (Moshannon Br.), Pa.	Terminus, Pa.	[illegible]	
Big Run Jc., Pa.	Terminus, Pa.	[illegible]	
Moshannon and Clearfield Jc., Pa.	Terminus, Pa.	[illegible]	
Beaver Jc., Pa.	Coal mines, Pa.	[illegible]	
Leckie Jc., Pa.	Leckie colliery, Pa.	[illegible]	
Barnes Jc., Pa.	Terminus, Pa.	[illegible]	
Elsie Jc., Pa.	Terminus, Pa.	[illegible]	
Forsyth Jc., Pa.	Terminus, Pa.	[illegible]	
Coal Run Jc., Pa.	Coal mines, Pa.	[illegible]	
Morgan Run, Jc., Pa.	Coal mines, Pa.	[illegible]	
Goss Run Jc., Pa.	Coal mines, Pa.	[illegible]	
Goss Run Jc., No. 2, Pa.	Coal mines, Pa.	[illegible]	
Goss Run Jc. No. 3, Pa.	Coal mines, Pa.	[illegible]	
Houtzdale Jc., Pa.	Coal mines, Pa.	[illegible]	
Amoreville Jc., Pa.	Coal mines, Pa.	[illegible]	
Amoreville Branch Ext. Jc., Pa.	Coal mines, Pa.	[illegible]	
Amoreville Branch No. 2 Jc., Pa.	Coal mines, Pa.	[illegible]	
Kendrick Jc., Pa.	Terminus, Pa.	[illegible]	
Madera Jc., Pa.	Coal mines, Pa.	[illegible]	
Little Muddy Run Jc., Pa.	Terminus, Pa.	[illegible]	
Muddy Run Jc., Pa.	Terminus, Pa.	[illegible]	
Smoke Run Jc., Pa.	Terminus, Pa.	[illegible]	
Renton Jc., Pa.	Coal mines, Pa.	[illegible]	
Pine Run Jc., Pa.	Coal mines, Pa.	[illegible]	
Beulah Jc., Pa.	Coal mines, Pa.	[illegible]	
Mapleton Jc., Pa.	Coal mines, Pa.	[illegible]	
Mapleton Jc., No. 2, Pa.	Coal mines, Pa.	[illegible]	
Mapleton Jc., No. 3, Pa.	Columbia colliery, Pa.	[illegible]	
Phillipsburg, Pa.	Morrisdale, Pa.	[illegible]	
Derby Jc., Pa.	Coal mines, Pa.	[illegible]	
Graham Jc., Pa.	Coal mines, Pa.	[illegible]	
Liveright Jc., Pa.	Terminus, Pa.	[illegible]	
Greenpoint, Pa.	Terminus, Pa.	[illegible]	
Beta Jc., Pa.	Terminus, Pa.	[illegible]	[illegible]
Tipton R. R.			
Tipton, Pa.	Tipton Run coal mines, Pa.	[illegible]	

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Pennsylvania and North Western R. R.			
6-10 m. west of Bellwood, Pa.	Houtzie, Pa.	[illegible]	
Tigart, Pa.	Wm Fritz's mine, Pa.	[illegible]	
Glasgow, Pa.	Bungarie mine, Pa.	[illegible]	
Irvona, Pa.	Bentley's mills, Pa.	[illegible]	
Punxsutawney, Pa.	Barnhill White mine, Pa.	[illegible]	
Anita, Pa.	Schaffer mine, Pa.	[illegible]	
Houtzie, Pa.	Fordham, Pa.	[illegible]	[illegible]

From	To	Miles.	
Hollidaysburg, Morrison's Cove, etc., branches.			
Altoona, Pa	Hollidaysburg, Pa	7.30	
Duncansville, Pa	Portage iron works, Pa	0.60	
Hollidaysburg, Pa	Henrietta, Pa	18.90	
Roaring Spring, Pa	Ore Hill, Pa	3.00	
Martinsburg Jc., Pa	Martinsburg, Pa	0.70	
Morrison's Cove Jc., Pa	Petersburg Jc., Pa	31.61	
Canoe Creek Jc., Pa	Moore's mill, Pa	2.62	
Crissman Jc., Pa	Terminus, Pa	1.24	
Clapper Jc., Pa	Terminus, Pa	0.76	
Springfield Jc., Pa	Oreminea, Pa	8.20	
Clover Creek Jc., Pa	Clover creek, quarries, Pa	2.38	
"Y" switches, Pa	Newry, Pa	3.00	80.31
Cambria & Clearfield Ry.			
Cresson, Pa	Hoover's Mill Jc., Pa	49.59	
Kaylor, Pa	Ebensburg, Pa	4.81	
Bradley Jc., Pa	Cherry Tree, Pa	17.61	
Carrolltown road, Pa	Coal mines, Pa	0.63	
Spangler (Sterling Jc.), Pa	Coal mines, Pa	1.86	
Spangler (Lantzy Jc.), Pa	Coal mines, Pa	0.55	
Barnesboro (Walnut Run Jc.), Pa	Coal mines, Pa	2.25	
Barnesboro (Porter Run Jc.), Pa.	Coal mines, Pa	1.68	
Barnesboro (Gardner Run Jc.), Pa	Coal mines, Pa.	1.23	
Patton (Patton Jc., No. 1), Pa	Coal mines, Pa	1.24	
Patton (Patton Jc., No. 2), Pa	Coal mines, Pa	2.16	
Patton Jc., No. 3, Pa	Coal mines, Pa	3.00	
Patton (Patton Jc., No. 4), Pa	Coal mines, Pa	0.46	
Garway, Pa	Mitchell's mines, Pa	5.81	
Welshdale, Pa	Coal mines, Pa	1.52	
St. Lu Jc., Pa	Coal mines, Pa	0.43	
La Jose Jc., Pa	La Jose, Pa	0.55	
Cush Creek Jc., Pa	Terminus, Pa	1.55	
Glen Campbell Jc. (McCoy's Run branch)	Coal mines, Pa	2.19	
Glen Campbell Jc. (Whitehead branch)	Coal mines, Pa	0.59	
Glen Campbell Jc. (Brady's Run branch)	Coal mines, Pa	0.78	
Glen Campbell Jc. (Glen Campbell branch)	Coal mines, Pa	1.46	
Glen Campbell Jc. (Hoover's Mill branch)	Hoover's mill, Pa	0.34	
Glen Campbell Jc. (Suter Zranch).	Coal mines, Pa	0.37	102.66
Ebensburg & Black Lick R. R.			
Ebensburg, Pa	Dilltown, Pa	18.93	
Twin Rocks, Pa	Terminus, Pa	1.10	
¾ m. east of Vintondale, Pa	Black Lick coal mines, Pa	0.85	20.88
Cresson & Irvona R. R.			
Cresson, Pa	Irona, Pa	26.67	
Condron, Pa	Coal mines, Pa	1.52	
Flinton, Pa	Kreamer's saw mill, Pa	0.85	
Coalport, Pa	Coal mines, Pa	0.50	29 54
South Fork R. R.			
South Fork, Pa	Ashtola, Pa	20.71	
Lovett Station, Pa	Lloydell, Pa	4.05	
2-10 m. north of Lovett, Pa.	Llanfair, Pa	5.26	
Eureka No. 30 Jc., Pa	Eureka No. 37 mine, Pa	1.45	
Eureka No. 30 Jc., Pa	Eureka No. 39 mine, Pa	6.80	

95 From	To	Miles.	
South Fork R. R.—Continued.			
Paint Creek Jc., Pa	Eureka mine, No. 30, Pa	1.64	
28-100 m. north of Windber, Pa.	Eureka mine, No. 31, Pa	0.74	
7-100 m. south of Windber, Pa.	Eureka mine, No. 35, Pa	0.76	
60-100 m. south of Windber, Pa.	Eureka mine, No. 36, Pa	1.00	
22-100 m. south of Windber, Pa.	Eureka mine, No. 32, Pa	0.78	
1 59-100 m. south of Windber, Pa	Eureka mine, No. 34, Pa	0.35	
4 60-100 m. south of Windber, Pa	Curry Mill, Pa	1.40	44.94
Indiana branch.			
Blairsville intersection, Pa	Indiana, Pa	18.91	
Tearing Run Jc., Pa	Terminus, Pa	0.83	
Homer and Cherrytree Jc., Pa.	Terminus, Pa	0.45	20.19
Western Pennsylvania R. R.			
Bolivar, Pa	Allegheny City, Pa	77.22	
Butler Jc., Pa	Butler, Pa	21.05	
Bolivar Jc., Pa	Dornock Point, Pa	16.53	
Blairsville, Pa	Terminus, Pa	1.50	
Jc. 1¼ m. west of Saltsburg, Pa.	Terminus, Pa	0.77	
5 7-10 m. west of Saltsburg, Pa.	Terminus, Pa	2.11	
Apollo Jc., Pa	Beale's quarry, Pa	1.98	
Anderson Jc., Pa	Hill Junction, Pa	2.57	
Schenley Jc., Pa	Allegheny Valley R. R. Pa	5.05	
Bailey's Run Jc., Pa	Terminus, Pa	0.30	129.08
South West Pennsylvania Ry.			
Greensburg, Pa	Fairchance, Pa	44.79	
Latrobe, 45-100 m. west of, Pa.	Whitney Branch Jc., Pa	3.88	
Lippincott Branch Jc., Pa	Terminus, Pa	1.49	
Whitney Branch Jc., Pa	Terminus, Pa	1.75	
Huff's Station, Pa	Radebaugh, Pa	3.95	
Hempfield Branch Jc., Pa	Terminus, Pa	11.64	
Andrews Run Jc., Pa.	Terminus, Pa	1.72	
Youngwood, Pa	Trauger, Pa	7.87	
Boyer Run Jc., Pa	Terminus, Pa	1.82	
Brinker Run Jc., Pa	Terminus, Pa	2.10	
Shoup, Pa	Mammoth, Pa	2.37	
Bessemer Jc., Pa	Bessemer coke ovens, Pa	1.65	
Hunker (Hunker Branch Jc.), Pa.	Terminus, Pa	1.21	
Hunker (Westmoreland Br. Jc.), Pa	Terminus, Pa	0.43	
Ruffsdale Jc., Pa	Terminus, Pa	1.24	
Tar Station, Pa	Terminus, Pa	0.65	
Alverton (Stoneville Br. Jc.), Pa.	Terminus, Pa	1.51	
Scottdale-Overton (Scottdale Br. Jr.)	Junebug branch, Pa	1.87	
Junebug Jc. with Scottdale Br., Pa	Jc. with Morewood branch, Pa.	1.20	
Schoonmaker Jc. with Junebug Br., Pa	Terminus, Pa	0.46	
Junebug branch, Pa	Morewood, Pa	1.73	
Texas Jc. with Junebug Br., Pa.	Terminus, Pa	4.98	
Everson, Pa	Youghiogheny (No. R. R.), Pa.	1.92	
New Haven, Pa	Monarch, Pa	5.87	
Watt (3-10 m. north of), Pa	Terminus, Pa	1.18	
Watt, Pa	Terminus, Pa	1.12	
Dunbar (6-10 m. south of), Pa.	Terminus, Pa	0.38	
Uniontown (3-10 m. north of), Pa	Ache Jc., Pa	8.07	
Rainey Jc., Pa	Terminus, Pa	2.44	
Shamrock Jc.	Terminus, Pa	1.32	
Oliphant (6-10 m. south of), Pa.	Terminus, Pa	1.71	
Wynn Jc., Pa	Terminus, Pa	0.26	124.58

From	To	Miles.	
Pittsburgh, Virginia & Charleston Ry.			
Pittsburgh (south side), Pa	West Brownsville, Pa	53.20	
23d St., Pittsburgh (S. side), Pa.	Fifth St., Pittsburg (S. side)	1.73	
Hays Station, Pa.	Harrison coal works, Pa	0.78	
Cochran (2-10 m. south of), Pa.	McKeesport, Pa	1.52	
Peters Creek, Pa	Terminus, Pa	5.33	
West Brownsville Jc., Pa.	Redstone Jc., Pa	16.56	
Brownsville Branch Jc., Pa.	Brownsville, Pa	1.00	
Keister Jc., Pa	Terminus, Pa	1.34	
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Pittsburgh, Virginia and Charleston Ry.—Continued.			
Vance's Mill Jc., Pa	Bute, Pa	2.91	
Bute Run Jc., Pa	Taylor & Fulton coke w'ks, Pa.	1.33	
Gates, Pa.	Riverview, Pa	5.60	
Huron, Pa.	Edenborn, Pa.	3.49	
Gates, Pa.	Lambert, Pa	3.03	
Cat's Run Jc., Pa	Griffen, Pa	1.20	99.02
Port Perry branch.			
East Pittsburgh, Pa	Thomson, Pa.	1.32	1.32
Monongahela & Washington R. R.			
Monongahela City, Pa.	Terminus, Pa		14.29
Masontown & New Salem R. R.			
Moser Run Jc., Pa.	Buffington, Pa		6.04

Philadelphia & Erie Railroad division.

From	To	Miles.	
Main line and branches.			
Sunbury, Pa.	Erie Pa.	287.56	
Queen's Run (1-10 m. east of), Pa	Terminus, Pa.	3.60	
Williamsport (Allen's), Pa.	Nisbet, Pa	7.39	
Newberry (7-10 m. east of), Pa.	Williamsport (Market St.)	1.93	
Williamsport (Third St. Jc.), Pa.	Loyalsock Creek, Pa 2.63		
Williamsport (Hepburn St.)	Williamsport (3d St. cross) 1.22		
Williamsport (Park St.)	Williamsport (Rose St.) 0.47	4.32	304.80
Johnsonburg railroad and branch.			
Johnsonburg, Pa.	Clermont, Pa		19.69
Ridgway & Clearfield R. R.			
Ridgway, Pa.	Falls Creek, Pa.		27.23
Bald Eagle Valley R. R. (B. N. & L. branch P. & E. portion).			
Lemont (Jc. L. & T. R. R.), Pa.	Bellefonte, Pa.		9.45
Lewisburg & Tyrone R. R. (P. & E. portion).			
Montandon, Pa.	Lemont (Jc. with B. E. V. R. R.), Pa.		57.84
Pennsylvania railroad.			
Sunbury Pa.	Tomhicken, Pa.	43.44	
Catawissa, Pa.	Wilkesbarre, Pa	43 13	
Nanticoke, Pa.	Glen Lyon, Pa	4.69	
Nanticoke, Pa	West Nanticoke, Pa.	0.61	
Rock Glen Jc. (S. H. & W. Ry.), Pa	Nescopeck, Pa.	11.96	
Pottsville, Pa.	New Boston Jc. (L. V. R. R.), Pa.	9.86	
Morea, Pa	Morea Breaker, Pa	1.00	
Frackville, Pa.	Shenandoah, Pa.	4.98	
Shenandoah (8-10 m. east of), Pa	William Penn colliery, Pa.	2.54	
Selinsgrove Jc., Pa	Lewistown Jc., Pa.	44.74	
Lewistown, Pa.	Milroy, Pa.	11.14	178.09

Buffalo & Allegheny Valley division.

From	To	Miles.	
Allegheny Valley Ry. main lines.			
Pittsburg	Oil City	132.50	
Red Bank	Driftwood	109.70	242.20
Indian Run branch.			
New Kensington, Pa	Parnassus, Pa	1.31	1.31
Plum Creek branch.			
Verona	Plum Creek	6.80	6.80
Sligo branch.			
Lawsonham	Sligo	10.20	10.20

97 Northern Central Railway line.

From	To	Miles.	
Main line and branch.			
Sunbury, Pa	Dauphin, Pa	45.31	
Marysville, Pa	Baltimore, Md	91.51	136.82
Hollis, Md	Green Spring Jc., Md	8.59	145.41
Elmira & Lake Ontario R. R. and branches.			
Canandaigua, N. Y	Chemung Jc. (Erie R. R.), N. Y.	64.00	
Canandaigua, N. Y	Canandaigua lake, N. Y	1.43	
Stanley, N. Y	Sodus Point, N. Y.	34.18	99.61
Elmira & Williamsport R. R.			
Southport Jc. (Erie R. R.), N. Y.	Williamsport, Pa		75.50
Shamokin Valley & Pottsville R. R. and branches.			
Sunbury, Pa	Mt. Carmel, Pa	27.30	
Lancaster Jc. (1 4-10 m. east of Shamokin)	Hickory Ridge colliery, Pa	2.48	
Scott Jc., Pa	Scott breaker, Pa	2 84	
Green Ridge Jc., Pa	Union Coal Co.'s store, Pa	1.49	
Fagley Jc., Pa	Terminus, Pa	1.55	
Richards Jc, Pa	Richards colliery, Pa	1.54	
Mt. Carmel (Montelius Jc.) Pa.	Mt. Carmel breaker(east of), Pa.	1.22	38.42
Lykens Valley R. R.			
Millersburg, Pa	Williamstown (4-10 m. west of), Pa		19.29
Rockville branch, P. R. R.			
Dauphin, Pa	Rockville, Pa		2.82
York branch, P. R. R.			
Columbia, Pa	York, Pa		12.88
York, Hanover & Frederick R. R.			
York, Pa	Frederick, Md		55.65
Union R. R.			
Baltimore (Cen. of North St.), Md.	Bay View Jc. (P. W. & B. R. R.) Canton & Colgate creek, Md.		9.56

Philadelphia, Wilmington & Baltimore railroad and operating lines.

From	To	Miles.	
Main line and branches.			
Phila. (Broad and Prime Sts.), Pa.	Baltimore (President St.), Md.	94.47	
Phila. (Jc. with Junc. R. R.), Pa.	Phila. (Gray's Ferry station), Pa.	0.20	
Perryville (P. W. & B. Jc.), Md.	Perryville (C. & P. D. Ry. Jc.), Md.	0.32	

From	To	Miles.	
Bayview (P. W. & B. Jc.), Md.	Bayview (Union R. R. Jc.), Md.	0.06	
Phila. (Broad and Wash. Ave.), Pa.	Phila. (Del. Riv. & Wash. Ave.)	1.37	
Phila. (Wash. Ave. and Swanson St.), Pa.	Phila. (Swanson and Almond Sts.).	0.34	
Penna. and Delaware State line.	Naaman's creek, Del.	0.72	
Edgemoor, Del.	Newport (north of), Del.	4.82	
Landlith (Wilmington), Del.	Wilmington (Augustine's mill).	2.14	
Wilmington (West Yard Jc.), Del.	Shellpot Branch crossing and Jc. with Delaware R., R. Del.	0.97	
Newark, Del.	Delaware City, Del.	11.79	117.20
Junction railroad.			
Phila. (Belmont Jc., P. & R. R. R).	Phila. (Gray's ferry), Pa.		3.62
South Chester railroad and branches.			
Chester (Howell St.), Pa.	Penna. and Delaware State line.	2.72	
Lamokin, Pa.	Lamokin (Jc. with So. Ches. R. R.)	0.49	
Linwood, Pa.	Marcus Hook, Pa.	0.55	3.76
Elkton & Middletown railroad.			
Elkton, Md.	Big Elk river, Md.		0.33
Columbia & Port Deposit railway.			
South Columbia, Pa.	Perryville, Md.		42.68
98			
Baltimore & Potomac railroad and branches.			
Baltimore, Md.	Bowie, Md.	24.40	
Bowie, Md.	Pope's creek, Md.	48.70	
Bowie, Md.	So. end Long bridge, opposite Washington, D. C., Va.	18.90	
Loudon Park, Md.	Clermont stock yards, Md.	1.20	93.20
Washington Southern Railway branch.			
So. end Long bridge, opposite Washington, D. C.	Roslyn, Va.		3.18
Philadelphia & Baltimore Central railroad and branches.			
Phila. (31st and Chestnut Sts.), Pa.	Wawa, Pa.	16.77	
Wawa, Pa.	Octoraro Jc. (C. & P. D. R. R.), Md.	45.83	
Wawa, Pa.	West Chester, Pa.	9.43	
Brandywine Summit, Pa.	Kaolin works, Pa.	1.63	73.66
Philadelphia & Delaware County railroad.			
Fernwood, Pa.	Newton square, Pa.	9.93	
Cardington Jc., Pa.	Millbourne mills, Pa.	1.96	11.89
Chester Creek R. R.			
Lenni, Pa.	Lamokin, Pa.		6.69
Delaware railroad.			
Shellpot crossing (Jc. with P. W. & B. R. R.), Del.	Delmar, Del. & Md.	95.22	
Shellpot Branch Jc., Del.	New Castle, Del.	5.45	
Townsend, Del.	Centreville, Md.	35.15	
Clayton, Del.	Smyrna, Del.	1.29	
Clayton, Del.	Oxford, Md.	54.30	
Seaford, Del.	Cambridge, Md.	32.97	224.38
Smyrna & Delaware Bay R. R.			
Clayton, Del.	Del. and Md. State line.		6.95

From	To		Miles.
Baltimore & Delaware Bay R. R.			
Del. and Md. State line	Chestertown, Md	22.92	
Worton, Md	Nicholson, Md	3.72	26.64
Delaware, Maryland & Virginia railroad.			
Harrington, Del	Rehoboth, Del	43.57	
Georgetown, Del	Franklyn City, Va	53.96	97.53

West Jersey & Seashore Railroad lines.

From	To	Miles.	
Main lines and branches.			
Camden, N. J	Cape May, N. J	80.92	
Camden, N. J	Atlantic City, N. J	58.73	
Woodbury, N. J	Salem, N. J	28.39	
Salem (branch in), N. J	Salem, N. J	1.27	
Elmer, N. J	Riddleton Jc., N. J	10.38	
Alloway Jc., N. J	Quinton, N. J	4.22	
Glassboro, N. J	Bridgeton, N. J	19.68	
Bridgeton (Main St.), N. J	Bridgeton (Pearl and Lemon Sts.) N. J	1.67	
Manumuskin, N. J	Maurice river, N. J	9.76	
Newfield, N. J	Atlantic City (Atl. City Div. Jc.) N. J	32.60	
Pleasantville, N. J	Somers' Point, N. J	7.14	
Sea Isle Jc., N. J	Ocean City, N. J	16.47	
Sea Isle City, N. J	Stone Harbor, N. J	9.14	
Anglesea Jc., N. J	Holly Beach, N. J	7.24	
Absecon inlet, N. J	Atlantic City (Seaview excursion house), N. J	3.04	
Atlantic City (Seaview excursion house)	Longport, N. J	5.67	
Atlantic City (W. J. & S. Jc. at Drawbridge), N. J.	Atlantic City (Providence Ave. south of Chelsea), N. J.	1.23	
Haddonfield, N. J	Medford, N. J	11.98	309.53

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Delaware River R. R.			
Woodbury, N. J	Pennsgrove, N. J		19.90

Cumberland Valley Railroad lines.

From	To	Miles.
Main line.		
Harrisburg, Pa	Potomac River (Powell's Bend)	82.29
Cumberland Valley & Martinsburg R. R.		
Potomac river	Winchester, Pa	33.65
Dillsburg & Mechanicsburg R. R.		
Mechanicsburg (Dillsburg Jc.)	Dillsburg, Pa	7.70
Mont Alto R. R.		
Mont Alto Jc., Pa	Waynesboro, Pa	18.20
Southern Pennsylvania R. R.		
Marion (C. V. R. R. Jc.), Pa.	Richmond, Pa	21.40

Revised Summary.

(Excluding lines which have unexpired contracts.)

	Miles.
United Railroads of New Jersey division	469.59
Pennsylvania Railroad division	1,757.56
Philadelphia & Erie Railroad division	597.10
Buffalo & Allegheny Valley division (western New York and Pennsylvania excluded)	260.51
Northern Central Railway lines	459.23
Philadelphia, Wilmington & Baltimore R. R. and operated lines	711.71
West Jersey & Seashore Railroad lines	329.52
Cumberland Valley Railroad lines	163.15
Total	4,748.37

SCHEDULE B.

Washington, D. C.

Bridgeville, Del.
Dover, Del.
Edge Moor, Del.
Harrington, Del.
Laurel, Del.
Seaford, Del.
Smyrna, Del.
Wilmington, Del.

Baltimore, Md.
Canton, Md.
Conowingo, Md.
Cumberland, Md.
Frederick, Md.
Union stock yards, Md.

Asbury Park, N. J.
Atlantic City, N. J.
Berlin, N. J.
Bordentown, N. J.
Burlington, N. J.
Camden, N. J.
100 Cape May, N. J.
Cape May court house, N. J.
Egg Harbor, N. J.
Elizabeth, N. J.
Flemington, N. J.
Jersey City, N. J.
Lambertville, N. J.
Newark, N. J.
New Brunswick, N. J.
Ocean City, N. J.
Old Bridge, N. J.
Palermo, N. J.
Point Pleasant, N. J.
Princeton, N. J.
Red Bank, N. J.
Sea Isle City, N. J.
Trenton, N. J.

Brooklyn, N. Y.

Birmingham, Pa.
Blairsville, Pa.
Butler, Pa.
Chester, Pa.
Coatesville, Pa.
Connellsville, Pa.
Consohocken, Pa.
Corry, Pa.
East Liberty stock yards, Pa.
Ebensburg, Pa.
Elizabethtown, Pa.
Erie, Pa.
Franklin, Pa.
Gap, Pa.
Germantown, Pa.
Greensburg, Pa.
Hamburg, Pa.
Harrisburg, Pa.
Hollidaysburg, Pa.
Huntingdon,
Jeanette, Pa.
Johnstown, Pa.
Kane, Pa.
Kensington, Pa.
Lancaster, Pa.
Latrobe, Pa.
Loyalhanna, Pa.
Mt. Pleasant, Westmoreland Co., Pa.
McKeesport, Pa.
Norristown, Pa.
Oil City, Pa.
Pencoyd, Pa.
Philadelphia, Pa.
Pittsburg, Pa.
Pottstown, Pa.
Pottsville, Pa.
Reading, Pa.
Scottdale, Pa.
South Side, Pa.
Steelton, Pa.
Thurlow, Pa.
Tyrone, Pa.
Union City, Pa.

Canandaigua, N. Y.
Elmira, N. Y.
New York city, N. Y.
Penn Yan, N. Y.
Sodus, N. Y.
Watkins, N. Y.

Abattoir drove yards, Pa.
Allegheny, Pa.
Altoona, Pa.
Uniontown, Pa.
Vintondale, Pa.
Warren, Pa.
West Chester, Pa.
West Phila., Pa.
West Phila. stock yards, Pa.
Wilkesbarre, Pa.
Wilkinsburg, Pa.
Wilmerding, Pa.

SCHEDULE C.

	Penna. Railroad prop'n.	Postal Telegraph-Cable Co. prop'n.	Connecting lines prop'n.
Canadian Pacific Ry. Co.'s telegraph, east.....	25	25	50
Canadian Pacific Ry. Co.'s telegraph, west.....	12½	12½	75
Rocky Mountain Telegraph Company	33⅓	33⅓	33⅓
North American Telegraph Company	25	25	50
New York, Philada. & Norfolk Telegraph Company.....	28¾	28¾	42½
El Paso & North Eastern Ry. Co	32½	32½	35
Ann Arbor Railroad Co	30	30	40
Postal Telegraph-Cable Co. of Texas	30	30	40
Sante Fe & Grand Canyon Ry. Co..	37½	37½	25
Sante Fe, Prescott & Phœnix Ry. Co.....	16⅔	nil	83⅓

101 In the United States Circuit Court for the District of New Jersey.

Between—

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
and
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Defendants.
} On Bill, etc.

Affidavit of William Ettinger.

(Filed December 18, 1902.)

STATE OF NEW JERSEY, *County of Hudson*, } *ss.*:

William Ettinger, being by me duly sworn on his oath deposes and says:

That he is division operator of the New York division of the Pennsylvania Railroad Company. That his office is in Jersey City, and that the division extends from the water front in Jersey City, New Jersey, to the city of Philadelphia in the State of Pennsylvania, and includes the main line of the Pennsylvania railroad from Jersey City to the Delaware river at Trenton. As division operator he has

charge of all the telegraph and telephone lines on all the property of The United New Jersey Railroad and Canal Company and The Pennsylvania Railroad Company, the defendants in the above entitled suit, in the State of New Jersey. He has filled such position continuously for twenty-nine years last past.

The following is a general description of the present location of the poles of the Western Union Telegraph Company between Jersey City and the Delaware river, at Trenton, along the main line of the defendants:

Commencing at the Hudson river, the first wires of the line of the Western Union Telegraph Company which are on the property of the United New Jersey Railroad and Canal Company, leased to the Pennsylvania Railroad Company, and which wires form part of the telegraph line from New York to Trenton, consist of a cable attached to the east end of the pier of the defendants, known as pier C, in Jersey City. The said cable runs on or through the property
102 of the defendants westwardly along said pier to the line of solid fil-ing, and thence under ground, still on the property of defendants, to a point in Exchange place, Jersey City, opposite number 26 Exchange place, and on the north side thereof, a distance of about nine hundred feet from the river end of said pier C. That no portion of said cable is on the right of way of the United New Jersey Railroad and Canal Company or the Pennsylvania Railroad Company.

From said pole said telegraph line runs westwardly on poles erected on property of the defendants, but not on their right of way, to Washington street, a distance of about twelve hundred feet.

From Washington to Warren street, poles and wires of this line are on defendants' property, outside of their right of way.

From Warren street to a point about six hundred feet west thereof, five poles of this line are on the property of the defendants, but outside of their right of way.

From that point to Brunswick street, the wires and poles of this line are outside of the railroad property.

From Brunswick street to a point about sixteen hundred feet west thereof, there are twelve telegraph poles and wires of this line within the right of way of the railroad company.

From a point sixteen hundred feet west of Brunswick street to a point twenty-eight hundred feet west thereof, the telegraph poles and wires are on the defendants' property, but outside of their right of way.

From a point twenty-eight hundred feet west of Brunswick street to a point thirty-seven hundred feet west thereof, the telegraph poles and wires are within the right of way of the railroad company.

From a point thirty-seven hundred feet west of Brunswick street to a point near West Side avenue, Marion, the telegraph poles and wires are on the defendants' property, but outside of their right of way.

From West Side avenue to Giles street, there are eight of the poles of this line outside of the railroad property.

From Giles street to the east side of the Hackensack river, the poles and wires are on defendants' property, but outside of their right of way.

The wires are carried across the Hackensack river on bridge structure of the defendants.

From the westerly bank of the Hackensack river to Sixth street, Harrison, the poles and wires are on defendants' property, outside of their right of way.

103 From Sixth street to Fifth street, Harrison, the poles and wires are on the right of way of the railroad company.

From Fifth street to Fourth street, Harrison, the poles and wires are outside of the right of way, off of the railroad property.

From Fourth street, Harrison, to the Passaic river, the poles and wires are on defendants' right of way.

On Centre Street branch, from Fourth street to the Passaic river, the poles are on defendants' right of way.

The wires of this line are carried across the Passaic river on both the Commercial Dock route and the Centre Street route, by means of cables.

From the westerly side of Passaic river (with the exception of one pole located at the junction of River street and Railroad avenue) to a point near West Newark junction, the poles are off the right of way and the railroad property.

The said one pole is on the right of way of defendants.

From a point near West Newark junction to a point about a mile west of Waverly, the poles are outside of defendants' right of way and on defendants' property.

From a point about a mile west of Waverly to the Central railroad, Elizabeth, the poles are within the right of way.

From the Central Railroad crossing at Elizabeth to a point near Rahway avenue, Elizabeth, the poles are on defendants' property, but outside of their right of way.

From Rahway avenue, Elizabeth, to South Elizabeth station, the poles are outside of railroad property.

From South Elizabeth station to Main street, Rahway, the poles are on defendants' property, but not on their right of way.

From Main street, Rahway, to Poplar street, the poles are on the right of way.

From Poplar street, Rahway, to Milton avenue, the poles are on defendants' property, but not on their right of way.

From Milton avenue to a point four hundred feet west of Hazelwood avenue, the poles of this line are within the right of way of the railroad company.

From a point four hundred feet west of Hazelwood avenue to Six Roads, a distance of about one half a mile, the poles of this line are outside of the right of way of defendants.

From Six Roads to the crossing of the Essex and Middlesex turn-

pike, a distance of about a mile and a half, the poles of this line are on the property of the defendants, but outside of their right of way.

From this point to Iselin station, a distance of about three-
104 quarters of a mile, the poles of this line are on the right of way of the railroad company.

From Iselin to a point about forty-six hundred feet west thereof, the poles of this line are on the property of the defendants, but not on their right of way.

From a point about forty-six hundred feet west of Iselin, to a point about fifty-nine hundred feet west of Iselin, the poles of this line are within the right of way of the railroad company.

From a point fifty-nine hundred feet west of Iselin to the Raritan river, the poles of this line are on the property of the defendants, but not on their right of way.

From the east side of the Raritan river to the west side thereof, the telegraph wires are carried by means of a cable attached to the bridge of the railroad company.

From the west side of the Raritan river to George street in the city of New Brunswick, the poles of this line are outside of the right of way of the railroad company.

From George street, New Brunswick, to Handy street, New Brunswick, the poles of this line are on the right of way of the railroad company.

From Handy street, New Brunswick, to Millstone junction, a distance of about one mile, the poles of this line are on the property of the defendants, but not on their right of way.

From Millstene junction to the Delaware river (with the exception of nine poles near Union street in the city of Trenton), the poles of this line are on the right of way of the railroad company.

This line is the line of telegraph referred to in the bill of complaint, as a line of telegraph owned, maintained and operated by the Western Union Telegraph Company over and along the right of way of the above-named defendants.

WM. ETTINGER.

Subscribed and sworn to this 16th day of December, 1902, at Jersey City, N. J., before me,

WILLIAM A. MARTIN,
[L. S.] *Notary Public, of New Jersey.*

105 In the United States Circuit Court for the District of New Jersey.

Between—

THE WESTERN UNION TELEGRAPH COMPANY
and
THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company. } On Bill, etc.

Affidavit of Charles M. Sheaffer.

(Filed December 18, 1902.)

Charles M. Sheaffer, being duly sworn says:

1. I am the superintendent of telegraph of the Pennsylvania Railroad Company.

I have occupied that position, and other positions which have obliged me to familiarize myself with the method of construction and operation of telegraph wires and poles, for upwards of twenty years. I am thoroughly familiar with such methods of construction and operation.

2. The usual method of constructing telegraph wires and poles, is to fasten to the pole, at or near the top, a cross arm or bar, upon which the wires are strung. The usual length of the cross arm or bar is seven feet ten inches. Some of these cross bars, however are ten feet six inches in length. The cross bar or arm is usually made to extend nearly equally on each side of the pole, each arm projecting about four feet beyond it. In some methods of construction, however, the whole cross arm or bar projects from one side of the pole, entailing more danger of falling of the wires thus strung across the arm or bar.

If a line of poles and wires on the side of a railroad right of way, should be constructed in the ordinary manner, with the ordinary length of cross arm, part on each side of the pole, it would be necessary to plant the pole four feet inside of the right of way, physically occupying the point in which the pole is planted, and overhanging nearly eight feet in width of such right of way with the over-laid wires.

3. There is more or less danger attendant upon the stringing of a lot of telegraph wires over the right of way of a railroad company. In case of storms of sleet or snow there is danger of the wires breaking or becoming slack, thereby endangering the operation of the railroad.

106 4. Where a line of telegraph poles and wires is located along a railroad right of way at curves, it is necessary to guy or to brace the pole by guys of wire, or like substance, or by

poles. The point of fastening of the guy rope, or wire, or of planting the base of a bracing pole of the height of those now upon the Pennsylvania railroad, should not be less than four feet from the pole braced, and ought, for absolute safety, to be ten feet therefrom.

This guying or bracing necessarily entails a considerable use of the railroad right of way beyond the pole.

5. The railroad company has a line of wires and poles which it uses exclusively for its railroad purposes in the operation of its road. It is necessary for its railroad purposes that this shall be maintained.

Much additional business of telegraphing requires to be done by it in and about the carrying on of its business, which cannot be done upon the line of wires and poles thus used by it exclusively. It has found it necessary for many years and still finds it necessary, to secure the maintenance and use of a second line of wires and poles.

6. There is no place upon the right of way of the railroad company upon which such second line of wires and poles can be located, other than that occupied by the Western Union Telegraph Company prior to the notice given to it to remove its poles and wires from the right of way of the railroad company.

7. For the safety of the railroad company's operations, the control of all telegraphic appliances upon its right of way should be reserved to it. An appropriation of a portion of its rights of way for use by a telegraph company exclusively for its purposes would subject the business of transportation along the railroad to great risks because of the lack of necessary control over the same by the railroad company.

8. Familiar with the lines of the railroad company and of its system, I say that its whole right of way is necessary for its railroad purposes and the business necessary and properly incidental thereto; and that no additional line of poles and wires beyond the two to which I have referred, can be erected upon its right of way without interfering with the ordinary travel along said railroad, and with its necessary and proper operation.

9. The Western Union Telegraph Company has removed its telegraphic appliances from the depots and stations along the line of the railroad company, and now does its business in many of the cities and towns in which said depots and stations are located
107 through connections between its lines along the railroad system right of way and the lines leading into its various independent offices in said cities and towns.

10. There is not any great difficulty in obtaining, at a reasonable cost, a right of way between all the cities, towns and places of business located along the line of said railroad and of its system. Almost all, if not all, the cities, towns and places of business are connected by roads, streets and highways upon which its telegraph lines can be constructed.

11. I believe and therefore aver that the Western Union Telegraph Company will be enabled without serious delay or difficulty to transact all its business by means of facilities now within its control, outside of the lines of wires and poles on the right of way of the railroad company.

12. The railroad company at very many places now occupies the whole of the right of way with its railroad tracks and the necessary intervening spaces. The number of such places thus occupied is constantly increasing. During the past twenty years it has frequently found it necessary to increase the width of its original right of way, in order to transact its business. It will, in my judgment, be frequently necessary in the future, for the transaction of such business, to make additional acquirements of land, to further widening of its right of way.

CHARLES M. CHEARER.

Sworn to and subscribed before me, a notary public of the commonwealth of Pennsylvania, this seventeenth day of December, A. D. 1902.

HIRAM H. POTTS, [L. S.]
Notary Public.

Commission expires February 20th, 1905.

109 United States Circuit Court, District of New Jersey.

Between—

Western Union Telegraph Co., Complainant,
and
Pennsylvania Railroad Co. et al., Defendants } In Bill, etc.

Opinion.

(Filed January 14, 1905.)

Two suits have been brought in this court, the one at law to condemn lands of the defendant company sufficient for the construction, maintenance and operation of the telegraph lines of the complainant, The Western Union Telegraph Company, under and in accordance with the provisions of a certain act of the Congress of the United States passed July 24, 1866; and the other in equity to restrain the defendant from interfering with the telegraph lines of complainant now erected upon and along defendant's right of way until the question of the complainant's right to condemn the said lands upon the payment of compensation has been determined by the court.

It appears by the record that the complainant company has maintained its telegraph poles and lines upon the right of way used by

the defendant for more than forty years and that on September 20, 1881, an agreement was entered into between the complainant and defendant companies to continue for twenty years from that date, in and by which, for the rent therein reserved, the said defendant company granted to said complainant company a right to place, maintain and use upon the right of way of the Pennsylvania Railroad Company and the roads owned, operated or leased by it, a single line of telegraph poles and to maintain thereon such wires as the telegraph company might from time to time elect.

The said agreement also contained this provision:—"If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the
109 satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company."

In accordance with this provision and after it had been determined that they would not renew the contract, the railroad company on the 15th day of May, 1902, gave notice to the telegraph company that it must remove its poles and wires from their right of way on or before December 1, then next ensuing, and that if it failed so to do, the railroad company would cause them, under the clause of the contract above referred to, to be removed. The bill recites, and the allegation is substantiated by affidavit, that the wires which are strung over and upon the defendants' right of way are a part of a main trunk line, used by them in the interchange of communication for public and commercial purposes between people dwelling in different States of the Union; that their destruction would seriously interfere with such communication; that the lines have been erected at great cost, and that their worth in their present condition is in the neighborhood of three hundred and fifty thousand dollars; and that if the wires should be removed from the poles on which they are strung, and the poles cut down, their value would be less than fifty thousand dollars. It is alleged that under this condition of affairs the pecuniary loss which would be inflicted upon the complainant by the destruction of its poles and wires and the inconvenience entailed upon the general public would be very great; not only the injury would be one which, should the right which the complainants claim exist, they ought not to be required to suffer, but one for which there could be no adequate pecuniary recovery.

Upon this statements of facts the complainant asked that the defendant company be restrained from removing its poles and wires from its, the defendant company's right of way, in accordance with the strict terms of the contract, until their right of condemnation could be heard and determined; and the court granted a rule to

show cause why such preliminary injunction should not issue according to the prayer of the said bill, which said rule now comes on to be heard.

Upon the case now presented it appears that on July 24, 1866, Congress enacted that:

"Any telegraph company now organized or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate telegraph lines * * * over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law * * * but such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post roads."

That act further provided that, before any telegraph company should exercise any of the powers or privileges conferred by the act, such company should file its written acceptance with the Postmaster-General of the restrictions and obligations required by the act.

This act, the bill alleges, was accepted by the complainant company on the eighth day of June, 1867, and since that time the complainant company has conducted its business in accordance with such restrictions and obligations.

All railroads of the United States are by law declared to be post roads, (Revised Statutes, sec. 3964) and the right of way of the defendant company thereby became subject to the provisions of the act of 1866.

While the question here at issue has not had judicial interpretation by the court of last resort, the statute of July 24, 1866, as applicable to post roads, has several times been before the courts for their construction. It has been held that because of this law one company having exclusive privileges under the State law cannot prohibit the erection of the telegraph lines of another company on the post roads of the United States where such other companies have accepted the provisions of the act of July 24, 1866, when those in control of such roads have given their assent. (Pensacola Telegraph Company *vs.* Western Union Telegraph Company, 96 U. S. 1.)

It has also been decided, in United States *vs.* Union Pacific Railroad Company (160 U. S., 1) "That no railroad company owning a post road of the United States over which interstate commerce is carried on, can, consistently with the act of July 24, 1866, bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a State, which accepts the provisions of the act and desires the use of that roadway for its line in such manner as will not interfere with the ordinary travel thereon."

The right of a telegraph company which has complied with the provisions of the law to enter a State and erect its poles and lines therein, in accordance with the act of 1866, is recognized in the case of The Western Union Telegraph Company *vs.* Massachusetts (125 U. S., 530).

If a State cannot, by legislative enactment, prohibit a foreign
111 corporation which has complied with the act of 1866 from erecting its poles and wires over a post road belonging to a railroad company which has given its assent thereto; and if a railroad company cannot, by agreement with one telegraph company, bind itself to exclude another telegraph company from the use of its right of way because it is a post road, how can a railroad company (being a post road) nullify the law by arbitrarily refusing to grant them a right which the law confers? Surely if the railroad company cannot bind itself by agreement to exclude the telegraph company, it cannot do so arbitrarily.

It would seem that inasmuch as the act of July 24, 1866, gave any telegraph company, operating under State laws and accepting the provisions of the act, the right to erect its poles upon the post roads of the United States, so, too, it prohibited the owners of such post roads from doing anything which might be hostile to the object contemplated by Congress, and render its act ineffectual.

Postal Telegraph Company *vs.* Oregon Short Line (114 Fed. Rep., 787) was a suit to condemn a right of way for the plaintiff over the road of the Oregon Short Line. All of the questions raised here were there discussed by the learned judge, and the circuit court held that such right of condemnation existed, under the acts of Congress before referred to, and proceeded to assess the damages incurred thereby. Sufficient time has not elapsed since the rendering of this decision to have it passed upon by the court of last resort, and it is not, therefore, binding upon this court. It is not necessary however, that at this time this court should definitely pass upon that question of right. Enough has been said to show that the contention of the complainant of its right to condemn is not without force.

The only question now before the court, upon the return of this rule, is whether the defendants should be enjoined, pending the determination of the complainant's right to condemn, from interfering with the *status quo*, and doing to the complainant an injury which may be irreparable.

The rule relating to the granting of injunctions in such cases is well settled. The jurisdiction of a court of equity, among other things, is founded upon the right to prevent permanent injury for which pecuniary compensation is inadequate. It is not necessary that the court should determine that the complainant is entitled to a final award in its favor; it is enough that the case presented seems sufficiently meritorious to warrant the court in preserving the *status quo* until the real merits of the controversy have been finally determined.

112 In Allison *vs.* Corson (88 Fed. Rep., 581) it was said: "A preliminary injunction may properly issue whenever the questions of law or fact, to be ultimately determined are grave and difficult and the injury to the moving party will be immediate and certain and great if denied, while the loss or inconvenience to the

opposing party will be comparatively small and insignificant if it is granted."

It seems to me that the situation in the case at bar is analogous to that in The City of Newton *vs.* Lewis (79 Fed. Rep., 715) and that the remarks of Sanborn, circuit judge, apply here with peculiar force: "But the court knew that it must ultimately consider and determine these matters at the final hearing of the case, and if meanwhile it refused to issue the injunction, the property and business of the electric company would be immediately destroyed and the final decree of the court, if it should be in its favor, would be utterly nugatory."

To grant the injunction asked for in this case would result in irreparable injury to no one, while the refusal so to do, from which there would be no appeal, would result in the destruction of complainant's property for which they could receive no compensation.

It has been urged on the part of the defendants that the complainant should be required to vacate the premises of the defendant companies, in accordance with the terms of its contract. This, however, would but entail a great destruction in value of property without compensatory benefit to any one. If the right of condemnation exists, complainants should not be subjected to that loss while exercising it. The defendants also say that they have entered into a new contract, with another telegraph company, and that there is not sufficient room on their right of way to permit the maintenance and operation of the lines of more than one telegraph company. This question ought, I think, for the reasons above given, to await the final determination of the cause.

In view of the facts presented, and for the reasons above stated, I have decided to make permanent this injunction. In this way the defendants will have an opportunity to appeal to the next term of the circuit court of appeals; while, should the rule be discharged, the complainant would have no appeal and the injury to its property, which is threatened, would have been accomplished before the case had been properly considered.

Let the rule heretofore granted be made absolute.

ANDREW KIRKPATRICK. *Judge.*

113 In the United States Circuit Court for the District of New Jersey, as Yet of the Term of September, 1902.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, vs. THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Defendants.	On Bill for Injunction.

Order for Preliminary Injunction.

(Filed January 21, 1903.)

The order to show cause heretofore granted in the above stated cause coming on to be heard before the court in presence of John F. Dillon, Rush Taggart, Henry D. Estabrook and Richard V. Lindabury, of counsel with the complainant, and John G. Johnson and James B. Vredenburgh, of counsel with the defendants, and the complainant's bill of complaint and the affidavits annexed thereto and the affidavits filed by the defendants, having been read, and counsel for the respective parties having been heard, and the court having taken time for consideration,

It is now, on this twenty-first day of January, in the year of our Lord, one thousand nine hundred and three, ordered by the court in virtue of the power and authority vested therein by the Constitution and laws of the United States and according to the rules and practice thereof, that a preliminary injunction do issue according to the prayer of the said bill of complaint, to be directed to the said defendants The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, their and each of their servants, agents and employés, restraining the said defendants hereinabove named, and each of them, their and each of their servants, agents and employés, from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them, or of any part thereof, pending the determination of the said action at law referred to in the said bill of complaint, or until the further order of this court in the premises.

ANDREW KIRKPATRICK, *Judge.*

114 *Preliminary Injunction.*

(Filed February 4, 1903.)

United States Circuit Court, District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD and CANAL COMPANY.

UNITED STATES OF AMERICA, *District of New Jersey*, } *ss:*

The President of the United States to the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, Greeting:

Whereas, the Western Union Telegraph Company lately exhibited its bill of complaint, in the circuit court of the United States, for the district of New Jersey, against you, the said defendants, praying to be relieved touching the matters therein complained of, and especially that you the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company and all acting under you may be restrained from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them, or of any part thereof; we, therefore, in consideration thereof, and also of the particular matters in the said bill set forth, do strictly command and enjoin you, the said The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company and each of you and your and each of your servants, agents and employees, that from henceforth you do absolutely and entirely desist and refrain from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them, or of any part thereof until the hearing of the cause, or the further order of the court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Trenton, this twenty-seventh day of January, nineteen hundred and three.

[L. S.] S. D. OLIPHANT,
Clerk U. S. Circuit Court.

115 Served the within injunction on the defendant, The Pennsylvania Railroad Company at Jersey City in the district of

New Jersey on the second day of February, 1903, by delivering to and leaving with F. L. Sheppard, general superintendent of defendant company, personally, a copy thereof, and at the same time showing him this original and informing him of its contents.

Also served the within injunction on the defendant, The United New Jersey Railroad and Canal Company at Newark in the district of New Jersey on the second day of February, 1903, by delivering to and leaving with an adult person at the residence of F. Walcott Jackson, president of defendant company a copy thereof, and at the same time showing said person this original and informing said person of its contents.

Trenton, N. J. Feb'y 2, 1903.

THOMAS J. ALCOTT,
U. S. Marshal.

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, Respondents.

Assignment of Errors.

(Filed January 27, 1903.)

The respondents file the following assignments of errors upon which they and each of them will rely upon their appeal from the interlocutory order made by this honorable court on the twenty-first day of January nineteen hundred and three, granting an injunction *pendente lite* in said cause.

The respondents assign in error upon this appeal the following, namely:

The circuit court erred in making said interlocutory order:

First. In deciding that the said court had jurisdiction.

Second. In deciding that a preliminary injunction should issue in accordance with the prayer of the bill of complaint, to be directed to the said defendant The Pennsylvania Railroad Company,
116 restraining the said The Pennsylvania Railroad Company, its servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendant in the State of New Jersey as described in the bill of complaint, or of any of them, or of any part thereof.

Third. In deciding that a preliminary injunction should issue in accordance with the prayer of the bill of complaint, to be directed to the said defendant The United New Jersey Railroad and Canal Company, restraining the said The United New Jersey Railroad

and Canal Company, its servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant in the State of New Jersey as described in the bill of complaint, or of any of them, or of any part thereof.

Fourth. The court erred in ordering a preliminary injunction to issue according to the prayer of the said bill of complaint, to be directed to the said defendants, their and each of their servants, agents and employees, restraining the said defendants and each of them, their and each of their servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them or of any part thereof, pending the determination of said action at law referred to in the said bill of complaint, or until the further order of said court in the premises.

In order that the foregoing assignment of error may be and appear of record, the respondents present the same to the court and pray that such disposition may be made thereof as is in accordance with law and the statute of the United States in such case made and provided.

All which is respectfully submitted.

JAMES B. VREDENBURGH,
Solicitor for the Pennsylvania Railroad Company.
J. D. BEDLE,
Solicitor for the United New Jersey Railroad and Canal Company.

117 In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY Railroad and Canal Company, Respondents.

Bond.

(Filed January 27, 1903.)

Know all men by these presents, that we, The Pennsylvania Railroad Company, a corporation, and The United New Jersey Railroad and Canal Company, a corporation, as principals, and American Surety Company of New York, as surety, are jointly and severally held and firmly bound unto the above-named The Western Union Telegraph Company, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said The Western Union Telegraph Company and its successors, for which payment well and truly to be made we bind ourselves, our

and each of our heirs, executors, administrators, successors and assigns, severally firmly by these presents.

Sealed with our seals. Dated the twenty-sixth day of January in the year of our Lord one thousand nine hundred and three.

The condition of the above obligation is such that whereas, The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company have taken an appeal to the circuit court of appeals for the third circuit, to reverse an interlocutory order rendered and entered by the circuit court of the United States in and for the district of New Jersey, which order was made and entered in the above-entitled suit on the twenty-first day of January nineteen hundred and three;

Now, therefore, the condition of the above obligation is such that if the above-named The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, respondents herein, shall prosecute said appeal to effect and answer all
118 damages and costs, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN, *Vice-President.*
Attest:
LEWIS NEILSON, *Secretary.* [L. S.]
THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY,
By F. WOLCOTT JACKSON, *President.*
Attest:
LEROY H. ANDERSON, *Secretary.* [L. S.]
AMERICAN SURETY CO. OF NEW YORK,
By R. R. BENEDICT, *Resident Vice-President.*
Attest:
M. E. NEVILLE, *Resident Ass't Secretary.* [L. S.]

The within bond is hereby approved this 27th day of January, 1903.

ANDREW KIRKPATRICK, *Judge.*

In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Respondents.
} Bill in Equity.

Petition of Appeal.

(Filed January 27, 1903.)

To the honorable the judges of the United States circuit court:

The above-named respondents in the above-entitled cause, The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, conceiving themselves aggrieved
119 by the order made and entered by the above-named court in the above-entitled cause, under date of January twenty-first, nineteen hundred and three, wherein and whereby it was and is ordered that a preliminary injunction do issue according to the prayer of the said bill of complaint, to be directed to the said defendants, The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, their and each of their servants, agents and employees, restraining the said defendants and each of them, their and each of their servants, agents and employees, from in any manner interfering with the use and operation of the telegraph lines of the said complainant, upon the roadway and right of way of the said defendants in the State of New Jersey, as described in the said bill of complaint, or of any of them, or of any part thereof, pending the determination of the said action at law referred to in the said bill of complaint, or until the further action of the said court in the premises, and by which interlocutory order the complainant was awarded a preliminary injunction against the said respondents,—hereby petition the said court for an order allowing said respondents and each of them to prosecute an appeal from said interlocutory order granting said preliminary injunction, to the honorable United States circuit court of appeals for the third circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said respondents shall give and furnish upon such appeal: and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States circuit court of appeals for the third circuit.

And your petitioners will ever pray, &c.

JAMES B. VREDENBURGH,
Solicitor for the Pennsylvania Railroad Company.

JAMES B. VREDENBURGH, *Of Counsel.*

J. D. BEDLE,
Solicitor for the United New Jersey Railroad and Canal Company.

I allow this appeal.

ANDREW KIRKPATRICK, *Judge.*

Jan. 27, 1903.

120 *Citation.*

(Filed January 29, 1903.)

By the Hon. Andrew Kirkpatrick, judge of the district court of the United States for the district of New Jersey and *ex-officio* judge of the circuit court of the United States for said district, in the third circuit.

To the Western Union Telegraph Company:

Whereas, the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company have lately appealed to the United States circuit court of appeals in the third circuit, from an interlocutory order and decree lately rendered in the circuit court of the United States for the district of New Jersey, made in favor of you, the said The Western Union Telegraph Company, and has filed the security required by law;

You are therefore hereby cited to appear before the said United States circuit court of appeals for the third circuit to be held at the city of Philadelphia in the State of Pennsylvania on the eighteenth day of February next to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton in the district of New Jersey in the third circuit, the twenty-seventh day of January in the year of our Lord one thousand nine hundred and three.

ANDREW KIRKPATRICK, *Judge.*

Service of a copy of the within citation is hereby acknowledged this 27th day of January, 1903.

RUSH TAGGART,
Sol'r for Appellee,
Per R. V. LINDABURY.

121 In the United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE United New Jersey Railroad and Canal Company, Respondents. } Order.

Order Extending Time to File Answer.

(Filed January 27, 1903.)

On motion of James B. Vredenburgh, Esquire, of counsel with the respondents, in the presence of Richard V. Lindabury, Esquire, of counsel with the complainant, and it appearing that an appeal has been taken to the circuit court of appeals for the third circuit, from the interlocutory order ordering a preliminary injunction in this case,

It is ordered that the time for the said respondents to answer the bill of complaint filed in this cause in this court be extended until twenty days after the entry of the judgment of the said circuit court of appeals on said appeal.

Dated January 27th, 1903.

ANDREW KIRKPATRICK, *Judge.*

United States Circuit Court for the District of New Jersey. In Equity.

Between—

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
and
THE PENNSYLVANIA RAILROAD COMPANY ET AL., Defendants.

Appearance.

(Filed May 4, 1903.)

The clerk will enter my appearance for the Pennsylvania Railroad Company.

JAMES B. VREDENBURGH,
Solicitor for the Pennsylvania Railroad Company.

122 United States Circuit Court for the District of New Jersey.

Between—

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
and
THE PENNSYLVANIA RAILROAD COMPANY ET AL., Defendants. } In Equity.

Appearance.

(Filed May 4, 1903.)

The clerk will enter my appearance for the United New Jersey Railroad and Canal Company.

J. D. BEDLE,
Solicitor of the Defendant United New Jersey Railroad and Canal Company.

United States Circuit Court, District of New Jersey.

WESTERN UNION TELEGRAPH COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY ET AL. } On Bill in Equity, &c.

Order Extending Time to File Answer.

(Filed June 10, 1903.)

And now, this eighteenth day of June, nineteen hundred and three, upon application of James B. Vredenburgh, of counsel with the respondents, it appearing that the order allowing a special injunction made by this court having been reversed by the circuit court of appeals for the third circuit, and an appeal from such order of reversal has been allowed by the Supreme Court of the United States,

It is ordered that the time for filing plea or answers herein is extended until forty days after the determination of the appeal now pending as aforesaid in the Supreme Court of the United States, and the return of the record thereof to this court.

ANDREW KIRKPATRICK, *Judge.*

233 Order.

(Filed June 25, 1903.)

In the Supreme Court of the United States.

The Western Union Telegraph Company, Appellant,
vs.
The Pennsylvania Railroad Company and The Camden New Jersey Railroad and Canal Company, Appellees. } Order.

Upon reading the petition of the Western Union Telegraph Company this day presented, and considering the records in this cause so far as necessary to determine the nature of the controversy between the parties litigant and the issues involved, it is

Ordered that the *status quo* and the present condition of the parties and property involved in this suit be continued and maintained until a decision shall be made on this appeal by the Supreme Court of the United States, or until this court shall order to the contrary; *Provided, however*, That said appellant, The Western Union Telegraph Company, shall without delay perfect its said appeal, and prosecute the same with diligence in this court, and shall immediately give a bond to the defendants conditioned that it will prosecute its appeal to effect and, failing to make its plea good, shall also answer all damages and costs, and that said bond shall be in the amount of one hundred thousand dollars, to be approved by one of the justices of this court.

Elmwood, Albany Co., N. York, June 17, 1903.

E. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

United States of America, ss:

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original order entered and filed June 25th, A. D. 1903, in the case wherein The Western Union Telegraph Company is appellant, and The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company are appellees, on file and now remaining among the records of the said court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 25th day of June, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-seventh.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

United States Circuit Court, District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.*, Defendants.
} On Bill for Injunction.

Final Decree.

(Filed September 29, 1903.)

It appearing to the court that heretofore, to wit, on the eighteenth day of June, 1903, an order was granted by this court *ex parte*, extending the time of the defendant to plead, answer or demur to the complainant's bill of complaint until twenty days after the entry of the decree on appeal in the Supreme Court of the United States; and motion being made on the part of the complainants on notice to the opposite party, to vacate the said order on the ground that it was improvidently granted and Rush Taggart, Esq., solicitor and Richard V. Lindabury, Esq., counsel for complainant, having been heard in support of said motion and James B. Vredenburgh, Esq., solicitor for and of counsel with the defendants having been heard in opposition thereto; and it appearing to the court that the matters involved in the said suit have been determined in the circuit court of appeals for the third circuit in a similar suit between the same parties, on an appeal from the circuit court for the western district of Pennsylvania, by which decree this court is bound; and it further
appearing to the court that on any hearing of the said cause
125 the decree of this court must, in accordance with the decree of the circuit court of appeals above referred to, be in favor of the defendants and that the bill of the complainant is therefore wholly without equity, it is considered by the court unnecessary and undesirable that the said cause should proceed further; therefore the court hereby accordingly, *sua sponte*, orders, adjudges and decrees that the said bill of complaint be and the same hereby is dismissed with costs against the complainant.

Dated, Trenton, N. J., September 29th, 1903.

ANDREW KIRKPATRICK, *Judge.*

The United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY Complainant, *vs.* THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Defendants. } On Bill in Equity.

Order Allowing Appeal.

(Filed September 29, 1903.)

This day came the complainant by Rush Taggart its solicitor and Richard V. Lindabury, its counsel and in open court, in the presence of James B. Vredenburgh, solicitor and of counsel for the defendants prays an appeal to the United States circuit court of appeals, from the judgment and order of this court, entered on its own motion dismissing the bill herein at the costs of the complainant, and on consideration thereof this court finds that the complainant herein is entitled to such appeal, and the same is hereby allowed in open court and the court fixes the bond upon such appeal, to be given by the complainant to the defendants in the sum of two hundred and fifty dollars ($250.00).

September 29th, 1903.

ANDREW KIRKPATRICK, *Judge.*

126 The United States Circuit Court for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *vs.* THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Defendants. } On Bill for Injunction.

Assignment of Errors.

(Filed September 29, 1903.)

And now comes The Western Union Telegraph Company, complainant in the above-entitled cause, and says there is error apparent upon the record of this cause as follows:

(1.) That the court erred in ordering the dismissal of the bill therein.

(2.) That the court erred in holding and decreeing that the bill of complainant is without equity, wherefore the complainant asks that the decree therein be reversed and the complainant restored to all things he has lost by reason thereof.

RUSH TAGGART,
Solicitor for Complainant.

In the Circuit Court of the United States for the District of New Jersey.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *against* THE PENNSYLVANIA RAILROAD COMPANY and The United New Jersey Railroad and Canal Company, Defendants. } On Bill in Equity.

Bond on Appeal.

(Filed September 30, 1903.)

Know all men by these presents that we, the Western Union Telegraph Company, and the American Surety Company,
127 both of the city, county and State of New York, are held and firmly bound unto the above named The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company, in the sum of ($250.00) two hundred and fifty dollars, to be paid to the said Pennsylvania Railroad Company, and United New Jersey Railroad and Canal Company, for the payment of which well and truly to be made, we do bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 30th day of September, 1903.

Whereas, the above named Western Union Telegraph Company has prosecuted an appeal to the United States circuit court of appeals for the third circuit, to reverse the decree rendered in the above entitled suit, by the judge of the circuit court of the United States for the district of New Jersey:

Now, therefore, the condition of this obligation is such, that if the above named Western Union Telegraph Company shall prosecute said appeal to effect, and answer all damages and costs, if it fail to keep said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY,
By R. C. CLOWRY, *President.*

Attest:
[SEAL.] A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK.
[SEAL.] DAVID B. SICKELY, *Vice-President.*
CORTLANDT S. VAN RENSSELAER,
Attorney.

126422
K. Jr.

STATE OF NEW YORK, *County of New York,* } ss:

On this 30th day of September, A. D. 1903, before me personally appeared R. C. Clowry, president of the Western Union Telegraph Company, to me known, who being by me duly sworn, did depose and say that he resides in the city, county and State of New York; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the
128 corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he signed the same as president. And on the same day and year before me personally appeared Abijah R. Brewer, secretary of the said company, to me known, who, being duly sworn, did depose and say that he resides in the borough of Glen Ridge, county of Essex and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he attested the same as secretary.

[L. S.] CHARLOTTE A. VAN BRUNT, *Notary Public, Notary Public, Kings County, No. 4.*

Certificate filed in New York county.

STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 30th day of September, 1903, before me, the subscriber, a commissioner of deeds for the State of New Jersey, in the State of New York, duly commissioned and sworn, personally came Cortlandt S. Van Rensselaer, who, being by me duly sworn, on his oath, saith; that he is one of the attorneys of the American Surety Company of New York, of the State of New York, and that he resides in the city of New York; that he knows David B. Sickels, vice-president of the American Surety Company of New York, and he knows too, the corporate seal of the said company; that the seal affixed to the foregoing instrument is such corporate seal; and that it was affixed by the said vice-president of the said *instrument* signed by the said vice-president as vice-president of said company, attested by deponent as attorney by order of the board of trustees of said company, in deponent's presence, as the voluntary act and deed of said company, that said company has duly complied with all the requirements of chapter 184 of the Laws of the State of New Jersey of the Year 1895; that the good available assets of the company exceed its liabilities, as such liabilities are ascertained in the manner provided in said chapter; that the American Surety Company of New York is duly incorporated under the laws of the State of New York;

and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said chapter; that it has on deposit with the comptroller of the State of New Jersey at least fifty thousand dollars ($50,000)
129 in good securities worth at par and market value at least that sum, and held for the benefit of the holders of the obligations of such company; and also has on deposit with the superintendent of insurance of the State of New York, good securities worth at par and at market value at least two hundred thousand dollars ($200,000) held for the security of its obligations and has a fully paid up, safely invested, and unimpaired capital of two million, five hundred thousand dollars; and said company has appointed Francis B. Dee, of the city of Trenton, as its attorney in the State of New Jersey, upon whom process of law can be served, and has filed in the office of the commissioner of banking and insurance, a written instrument duly signed and sealed, certifying such appointment, together with the residence and office of such attorney, within the State of New Jersey; and that the following is a true copy of a resolution of the board of trustees of the said American Surety Company of New York, passed on the 12th day of April, 1893, at its regular quarterly meeting, to wit:

"*Resolved*, That the president and the vice-president be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guaranteed bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

CORTLANDT S. VAN RENSSELAER, *Attorney.*

Sworn and subscribed in the city of New York, in the county and State of New York, this 30th day of Sept. A. D. 1903, before me a commissioner of deeds for the State of New Jersey in the State of New York, duly commissioned and sworn.

[L. S.] WALTER W. MILLER,
A Commissioner for the State of New Jersey.

Approved as to form and sufficiency, September 30, 1903.

ANDREW KIRKPATRICK, *Judge.*

130 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true and complete transcript of the record including all papers filed in the suit of The Western Union Telegraph Company against The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company as the same remains of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at Trenton, in said district, [L. S.] this twenty-fifth day of March, nineteen hundred and four.

S. D. OLIPHANT,
Clerk U. S. Circuit Court.

131 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original amended transcript of record in the case of Western Union Telegraph Company, appellant, and The Pennsylvania Railroad Company and The United New Jersey Ralroad & Canal Company, appellees, in accordance with stipulation of counsel filed herewith on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 21st day of April in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-eighth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

132 United States Circuit Court of Appeals, Third Circuit.

WESTERN UNION TELEGRAPH COMPANY, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW Jersey Railroad & Canal Company, Appellees.

It is hereby stipulated that the amended transcript of record filed in the above cause after the allowance of a writ of certiorari by the Supreme Court shall be taken in place of the transcript now on file in the Supreme Court.

HENRY D. ESTRABROOK,
Counsel for Appellant.
JOHN G. JOHNSON,
Counsel for Appellees.

(Endorsed:) United States circuit court of appeals, third circuit. Western Union Telegraph Company, appellant, *vs.* The Pennsylvania Railroad Company and The United New Jersey Railroad & Canal Company, appellees. No. 43 March term 1904. Stipulation of counsel. Filed April 21, 1904.

133 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel in the case of Western Union Telegraph Company, appellant, and The Pennsylvania Railroad Company and The United New Jersey and Canal Company, appellees, No. 43 March term 1904 on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 21st day of April in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-eighth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. 43. March term, 1904. United States circuit court of appeals, third circuit. Western Union Telegraph Company, appellant, *vs.* Penna. R. R. Co. & The United New Jersey R. R. & Canal Co., appellees. Certified copy. Stipulation of counsel.

134 [Endorsed:] File No. 19,256 Supreme Court U. S. October term, 1903. Term No. 605. The Western Union Telegraph Co. *vs.* The Pennsylvania R. R. Co. Amended transcript of record. Filed April 22d, 1904.

135 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Being informed that there is now pending before you a suit in which The Western Union Telegraph Company is appellant and The Pennsylvania Railroad Company and The United New Jersey Railroad and Canal Company are appellees, No. 43, March term 1904, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of New Jersey, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed

136 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of March, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

137 [Endorsed:] File No. 19,256. Supreme Court of the United States. No. 605, October term, 1903. The Western Union Telegraph Co. *vs.* The Pennsylvania Railroad Co. *et al.* Writ of certiorari.

138 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1904.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad and Canal Company, Appellees. } No. 43.

It is hereby stipulated that the transcript already filed in the clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari be taken as a return to said writ, dated the 22nd day of March, A. D. 1904.

HENRY D. ESTRABROOK,
Counsel for the Western Union Telegraph Co.
JOHN G. JOHNSON,
Counsel for the Pennsylvania Railroad Co. and the United New Jersey Railroad & Canal Company.

(Endorsed:) No. 43 March term 1904. U. S. C. C. of A., The Western Union Telegraph Company, appellant, *vs.* The Pennsylvania Railroad Company and The United New Jersey Railroad & Canal Co., appellees, Stipulation of counsel. Filed April 1. 1904.

139 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify by virtue of the foregoing writ of certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto annexed as my return to the said writ.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 19th day of April in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-eighth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

140 [Endorsed:] File No. 19,256. Supreme Court U. S. October term, 1904. Term No. 199. The Western Union Telegraph Co. petitioner *vs.* The Pennsylvania R. R. Co. Writ of certiorari & return. Filed April 22", 1904.

FILE COPY.

Supreme Court of the United States

[redacted]

[redacted]

[redacted]

[redacted]

BRIEF FOR APPELLANT.

[redacted]

[redacted]

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Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, vs. PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, Appellees.	No. 367. Oct. Term, 1903.
THE WESTERN UNION TELEGRAPH COMPANY, Petitioner, vs. PENNSYLVANIA RAILROAD COMPANY and THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.	No. 199. Oct. Term, 1904.

Although each of the above-entitled causes has its separate record, they really present the same question, and a statement of the manner in which they have been brought to this Court will show that the two records present the record of but one case and the same fundamental legal questions.

No. 367.

This record presents the following proceedings by which the cause is brought to this Court: Upon the bill filed by the Western Union Telegraph Company an application was made in the United States Circuit Court for the District of New Jersey for a preliminary injunction, restraining the defendants from taking certain action respecting telegraph lines of the complainant, pending the hearing and trial of this cause, and the trial of an action at law between the same parties. This preliminary injunction was allowed by Judge KIRKPATRICK, sitting as Circuit Judge. (Record No. 367, pp., 92-96). An appeal was taken from this action of the Circuit Court to the United States Circuit Court of Appeals for the Third Circuit by the defendants. This appeal was argued in the Circuit Court of Appeals. At the same time a writ of error sued out by the Western Union Telegraph Company to the action of the Circuit Court for the Western District of Pennsylvania was heard the two cases being argued together. This error case is No. 368 of the October Term, 1903, in this Court, and was ordered to be heard with these cases.

The writ of error was from a final judgment of the Circuit Court for the Western District of Pennsylvania in an action at law brought by the Western Union Telegraph Company against the Pennsylvania Railroad Company, involving some of the questions presented in No. 367. The appeal in this cause (No. 367) and the writ of error were argued together, and the Circuit Court of Appeals rendered one opinion applicable to both the cases thus argued, and in that opinion

considered the questions presented in the bill in this case as upon a general demurrer, and reached the conclusion "that the fundamental position of the Telegraph Company in each of these cases is untenable."

After this decision of the Circuit Court of Appeals the telegraph company made application to the Circuit Court of Appeals requesting that, inasmuch as the Court had by its opinion determined the merits of the entire controversy in the New Jersey case (No. 367), it would follow the practice adopted in Maas, Foos & Co. vs. Stover Mfg. Co., 89 Fed. Rep., 333, and approved by this Court in the opinion of that case upon *certiorari* to this Court in 177 U. S., 485, by directing the Circuit Court to dismiss the bill for want of equity, in order that the question involved might be brought to this Court for speedy determination, and a form of order for such action was presented. This form of order was objected to by the defendant railway companies, but the Court of Appeals declined to enter it, but adopted the form of order presented by the defendant railway companies, being in form simply a reversal of the order granting a preliminary injunction (Record No. 367, p. 109). Thereupon a petition for appeal to this Court was presented by the telegraph company to Mr. Justice PECKHAM of this Court, and allowed, and the appeal was filed in this Court. At the same time an order was entered to preserve the *status quo* as to the telegraph lines pending the determination of the appeal (Record No. 367, pp. 143, 144).

No. 199.

The record of No. 199 presents the bill filed in the United States Circuit Court for the District of New Jersey in the same cause, the allowance of the preliminary injunction, and the appeal to the Circuit Court of Appeals, as in No. 367.

Immediately before the allowance of the appeal to the Circuit Court of Appeals, application was made by the defendant railway companies to the Judge of the Circuit Court for the District of New Jersey for an extension of time for the defendants to answer the bill of complaint, and their time for answer was extended until 20 days after the entry of the judgment of the Circuit Court of Appeals on the appeal from the order granting a preliminary injunction This was on the 27th of January, 1903 (Record No. 199, p. 107). The opinion of the Circuit Court of Appeals upon said appeal was filed May 19th, 1903 (Record No. 367, p. 109), and the order entered in the Circuit Court of Appeals reversing the action of the Circuit Court in granting the preliminary injunction was entered on the 11th of June, 1903 (Record No. 367, p. 109).

The Western Union Telegraph Company's appeal to this Court in No. 367 was allowed by Mr. Justice PECKHAM on the 17th of June, 1903 (Record No. 367, p. 110).

On the 18th of June the defendant railway companies made an *ex-parte* application to the Circuit Court and obtained further time for filing pleas or answers to the bill of complaint in the Circuit Court in No. 367 until forty days after the determination of the

appeal of the Western Union Telegraph Company in the Supreme Court of the United States and the return of the record to the Circuit Court. Thereafter the Western Union Telegraph Company filed a motion to vacate the order of June 18th, giving the defendants this additional time to answer, upon the ground that the same had been improvidently granted. Upon the hearing of that motion in the Circuit Court, that Court, in view of the determination by the Circuit Court of Appeals of the questions presented by the bill, and particularly in view of the conclusion of the Circuit Court of Appeals expressed in its opinion that the bill of complaint was wholly without equity, considered it unnecessary and undesirable that the cause should proceed further, and, accordingly, *sua sponte*, decreed a dismissal of the bill of complaint at the cost of the complainant (Record No. 199, p. 110). Thereupon, in open court, the telegraph company prayed an appeal to the Circuit Court of Appeals, which was allowed, upon its entering a bond in the sum of $250, which was immediately done, and the appeal perfected (Record No. 199, p. 111). Thereupon the record was filed in the Circuit Court of Appeals.

While this appeal was pending in the Circuit Court of Appeals, and before it was argued in that court, a petition for writ of *certiorari* was filed in this court by the telegraph company reciting the history of the previous appeal in the same cause, and also the pendency of the appeal in the Circuit Court of Appeals, and asking that the record of the later appeal in the Circuit Court of Appeals should be certified to this Court, to be heard with the appeal already pending in this Court. This petition for writ of *certiorari* was

granted, following the practice approved in Pullman Car Company vs. Central Transportation Co., 171 U. S., 138.

We do not deem it necessary to discuss the questions of practice involved in taking the appeal in No. 367, the first of the above-entitled causes, nor as to the right of this Court to bring the record in No. 199 into this Court by *certiorari*, for the reason that the allowance of the latter writ brings the whole case into this Court, and we conceive that no question can now be made as to the fact that the whole case is in this Court for consideration upon the merits of the controversy between the parties as presented in the bill filed in the United States Circuit Court of New Jersey.

The Questions.

The questions presented upon the merits of the controversy are, as shown by the assignment of errors in the Circuit Court, as follows:

First. That the Court erred in ordering the dismissal of the bill therein.

Second. That the Court erred in holding and decreeing that the bill of complaint is without equity (Record No. 199, p. 111).

Nature of Bill.

The bill in equity filed in the United States Circuit Court of New Jersey (No. 199, pp. 1–16) sets forth the incorporation of the United New Jersey Railroad and Canal Company, the owner of the lines of railway de-

scribed, which were constructed and are maintained under certain acts of the State of New Jersey, which are set forth in paragraph 4 of the bill, from February 4, 1830, down to March 27, 1873. The early statutes incorporating the various companies are referred to by title and date of passage, and are material in some aspects, to which we may call attention later, but primarily and principally because they expressly provide that the roads of railway companies incorporated under those acts should be, and always remain, public highways (Record, 199, p. 4).

The bill further shows that, since the year 1851, the appellee has been engaged in the business of constructing and operating telegraph lines in the State of New York and adjoining States and has, as such telegraph company, acquired and constructed a system of telegraph lines extending throughout all the States and Territories of the United States and connecting with the submarine cables and land lines of other countries, the system operated directly by the telegraph company consisting of over 192,000 miles of poles and cables and over 900,000 miles of wire, and that a material portion of such system consists of the telegraph lines situated along and upon the railways of the defendant companies, which have been constructed and in operation for more than 40 years.

The bill further shows that since the 20th of September, 1881, these lines of telegraph have been operated and maintained under the provisions of a contract between the Pennsylvania Railroad Company, the lessee since 1873 of the said lines of railway and the appellant, a copy of which contract is attached and set forth as part of the bill. The bill sets forth that since the date named in the said contract for its term, to

wit, September 20th, 1901, the said contract was carried out and payments made thereunder, as shown by exhibits attached, monthly, the last payment being made on the 20th of June, 1902, and that on the 15th of May the defendant presented a notice requiring the removal of all the poles, wires and telegraph property of the appellant within six months from the 1st of June, 1902, and in default of compliance with the requirements of the notice, that the railway company would itself cause the said poles and wires and other property of the telegraph company to be removed at the expense of the latter. The bill sets forth that the said lines of telegraph have been at all times maintained, and can continue to be maintained and operated along the said lines of railway without interference with the operation and maintenance by the said railway or the ordinary travel upon the said railway, subject only to such slight changes in the location of some of the poles from time to time as the shifting of tracks or construction of new tracks may require, as in times past.

Following the notice of the 15th of May, certain correspondence was conducted between the telegraph company and the Pennsylvania Railroad Company, in which the former sought a conference with the latter for the purpose of adjusting and agreeing upon the compensation for the continued maintenance and operation of its telegraph lines along and upon the right of way of the said railroad companies, but the Pennsylvania Railroad Company absolutely refused to negotiate with the telegraph company for the continued use and occupation of the railways. The bill sets forth that the notice and requirement of removal of the said telegraph lines of the appellant is not because of any necessity of the defendant

railroad company, but is in order to allow the railroad company to install another telegraph company in the same space, and construct, maintain and operate telegraph lines in substantially the same manner as the complainant has maintained and operated them.

The bill sets forth the provisions of the Act of Congress approved July 24th, 1866, and the telegraph company's compliance with all the provisions, requirements, and obligations of the said act, and the transmission of a large amount of business over said lines for the Government of the United States at rates fixed by the Postmaster-General, in accordance with the provisions of said Act of Congress; it sets forth the provisions of the Act of Congress, making this and all other railroads in the United States and all letter-carrier routes, post-roads, and all public roads and highways post-roads. It sets forth further that, under the provisions of the said Act of Congress and under the provisions of the statutes of New Jersey, the said lines of railway are subject to the right and privilege of the telegraph company to construct, maintain and operate its telegraph lines over and along the said railways subject to the sole condition of not interfering with the ordinary travel upon said railways and also of compensating the said defendant railway companies for such use of said right of way, and sets up the fact that in an action at law instituted in the United States Circuit Court for the District of New Jersey the appellee had set forth its rights under the said Act of Congress and was seeking to have adjudicated and determined the amount of compensation which it would be required to pay to the said defendant companies for the right thus

to maintain and operate its telegraph lines along and upon the said railways. Pending the determination of the said equity cause (No. 367) and of the said suit at law, it asked a preliminary injunction restraining the defendant companies from interfering with the location, construction, maintenance, and operation of its lines of telegraph upon the roadway or right of way of the defendant companies' railways.

Upon this appeal, the first question we argue is this:

1. Has complainant a right under the Act of Congress of July 24, 1866, either alone, or in conjunction with certain provisions of the statute of New Jersey, to maintain this suit in equity or its action at law to have fixed the amount of compensation which it should pay to the defendants for the right to continue to maintain and operate its line of telegraph along and upon the defendants' railways? This the Circuit Court of Appeals in its opinion and the Circuit Court in its decree dismissing the Bill of Complaint denied and our contention will be that such a right exists.

ARGUMENT.

The Western Union Telegraph Company had the right to continue to occupy the lines of railway of the defendants under the provisions of the Act of Congress of July 24, 1866, and to have the compensation therefor to the defendant railway companies for so doing judicially ascertained.

The Act of Congress is entitled "AN ACT TO AID IN THE CONSTRUCTION OF TELEGRAPH LINES AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY AND OTHER PURPOSES."

Inasmuch as this act will be continuously referred to and relied upon throughout this brief, we here set forth the original act in its original four sections:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel of such military or post-roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its

said lines of telegraph may be located, as may be necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other.

"SEC. 2. *And be it further enacted*, That telegraphic communications between the several departments of the Government of the United States and their officers and agents, shall in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this Act, to any other corporation, association, or person: *provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this Act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this Act."

Stats. at Large, Vol. .

Legislation enacted many years prior to the passage of this act had declared all railroads to be post roads.

The following is Section 2 of the Act approved July 7, 1838:

"SEC. 2. *And be it further enacted*, That each and every railroad within the limits of the United States which now is, or hereafter may be made and completed, shall be a post route, and the Postmaster-General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than twenty-five per centum over and above what similar transportation would cost in post coaches."

Vol. 5, Stats. at Large, 283.

Section 3 of a subsequent Act, approved March 3, 1853, was as follows :

" SEC. 3. *And be it further enacted*, That all railroads and parts of railroads which are now or hereafter may be in operation, be, and the same are hereby, declared to be post-roads ; and the Postmaster-General may contract for carrying the mails thereon according to existing laws."

Vol. 10, Stats. at Large, 255.

These acts had not been repealed in 1866, nor have they been since.

By a subsequent act approved June 8th, 1872 (now Section 3964, Rev. Stats.), it is provided as follows :

" SEC. 3964. The following are established post roads : * * * All railroads or parts of railroads which are now, or hereafter may be in operation. * * * All letter carrier routes established in any city or town for the collection and delivery of mail matters."

By act approved March 1st, 1884, it is provided :

" That all public roads and highways while kept up and maintained as such are hereby declared to be post routes."

Vol. 23, Stats. at Large, 3.

The true construction of the provisions of the Act of July 24, 1866, is the fundamental question underlying the Bill filed in this case.

The contention of the Western Union Telegraph Company is that there is necessarily implied in the provisions of that act the right of construction, maintenance, and operation of lines of telegraph along any of the military or postroads within the limits of the United States, upon the payment of just compensation to the owners of such post roads. The further contention is that under

the general principles of law as well as under the decisions of this Court the determination of the amount of such compensation may be had in the Courts of the United States precisely as any other question in dispute between parties litigant.

The contention of the Pennsylvania Railroad Company and its co-defendant in the lower Courts was that all that is granted by this statute is:

1. Consent by the Government of the United States to any telegraph company accepting the provisions of the act, to construct lines over the public domain of the United States, and over and along military and post-roads owned by the United States, and across the navigable streams, and waters of the United States.

2. An assent by Congress generally to railway companies owning post-roads, to make any necessary arrangements with any telegraph company which has accepted the provisions of the act, but no obligation on the railway company to allow the telegraph company to occupy its right of way even upon payment of compensation; and

3. That the act prevents any hostile State legislation.

This is the definition of the meaning of the act contended for in the brief of the Pennsylvania Railroad Company filed in the Court below, and, therefore, we may assume that it will be the position taken upon this appeal respecting the meaning of this act.

The question which we have for consideration is, which of these meanings, in the light of sound principles and of such decisions as this Court and other Federal Courts have made, and in view of the pro-

visions and purpose of the act itself, is the correct one?

Decisions in this Court as to the Act of July 24, 1866.

We shall take up first the decisions which this Court has made bearing either directly or indirectly upon this question and consider what principle is decided in each of these cases and then consider the broad principles that should apply to an act of this character.

Pensacola Case.

(October, 1877.)

The act first came before this Court for consideration in the case of Pensacola Telegraph Company against the Western Union Telegraph Co. (96 U. S., 1) upon an appeal from the Circuit Court of the United States for the Northern District of Florida. The question arose in this form: The State of Florida, in December, 1866, passed an act incorporating the Pensacola Telegraph Co., and granting it the sole and exclusive privilege and right of

"establishing and maintaining lines of electric telegraph in the Counties of Escambia and Santa Rosa, either from different points in said counties or connecting with lines coming into said counties, or either of them, from any point in this State (Florida) or any other State."

In 1872 the Pensacola and Louisville R. R. Co. acquired the property of a Florida railroad company which was within the territory embraced by the exclusive grant to the Pensacola Telegraph Company,

and in June, 1874, the Pensacola and Louisville R. R. Co. granted to the Western Union Telegraph Co. the right to erect a telegraph line along and upon its right of way within the State of Florida. The Western Union Telegraph Company, in June, 1867, had duly accepted all the provisions and obligations of the Act of July 24, 1866, by filing its written acceptance with the Postmaster-General. Immediately after making the arrangement with the railroad company the Western Union commenced the erection of its line of telegraph along the right of way of the Pensacola and Louisville Railroad Company. The Pensacola Telegraph Company had its lines along this railway, and the railway was within the territory prohibited by the Act of Florida of 1866. Thereupon the Pensacola Company filed its bill in the Circuit Court of the United States for the Northern District of Florida to enjoin the construction and use of this line, basing its right to an injunction upon the exclusive grant to the complainant from the Legislature of Florida. Upon the hearing a decree was entered dismissing the bill, and an appeal was taken by the Pensacola Company to the Supreme Court of the United States.

The fundamental question in the case was as to the extent of the power of Congress under the sections of the Constitution, giving it power to regulate commerce with foreign nations and among the several States, and to establish post-offices and post-roads, as against legislation of the State of Florida granting the exclusive privilege to the Pensacola Telegraph Company. As is evident from the foregoing statement, the question was whether the legislation of Florida granting the exclusive right to the Pensacola Telegraph Company, or the Act of Con-

gress of July 24, 1866, was paramount. After deciding and passing upon this question, which was decisive of the whole case, and in favor of the power of Congress upon this subject, Chief Justice WAITE proceeds (in a paragraph which will be quoted by our opponents, and which is relied upon as a decision of the meaning and extent of the Act of July 24, 1866) to say:

"To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

"It is insisted, however, that the statute extends only to such military and post-roads as are upon the public domain; but this, we think, is not so. The language is, 'Through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post-roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceed-

ings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted."

The phase of the question which is now under consideration was not discussed by counsel, for the reason that the question of the right of the Western Union to construct, maintain, and operate its lines of telegraph lines upon the property of the Pensacola and Louisville Railroad as against the owner of the railroad, was not involved in the case. The Western Union Telegraph Company had made arrangements with the railroad company for the occupation of its right of way, and whether or not it had the right to be upon the railroad without the consent of the railroad company could not have been argued, and the reasons therefor presented to the Court, because such right was in no wise involved in the case, which was presented, and the briefs show that this question was not alluded to therein. The sole question was, whether, having obtained that right by private contract with the railroad company, so far as the railroad company could give it, the Legislature of Florida could prohibit it from exercising the right in a given territory in the face of the provisions of the Act of Congress.

Ann Arbor Case.

(May 21, 1900.)

The next case in which it will be claimed this Court has held adversely to the claim of the Telegraph Company upon the construction of this Act of Congress is the case of the Western Union Telegraph Co. vs. Ann Arbor R. R. Co. (178 U. S., 239), and it is important

to take note of the manner in which this case came into the Supreme Court.

The suit was originally instituted in the Circuit Court of Benzie County, State of Michigan, by the Western Union Telegraph Company, alleging that on the 25th of September, 1890, it entered into a contract with the Frankfort and Southeastern Railroad Company for the construction and maintenance of a telegraph line along the said railroad, for the period of twenty-five years from the date of the contract; that, in pursuance of this contract, it built telegraph lines along the railroad for the joint use of the railroad company and the complainant, and that those wires have been in constant use by the two parties from the date of their erection; that in 1892 the railroad was sold to the Toledo, Ann Arbor and North Michigan Railroad Company, and thereafter the whole road, upon default in mortgages, was sold under order of the Court and conveyed to the defendant the Ann Arbor Railroad Company, and that the officers of the Ann Arbor Railroad Company, who were named, were familiar with the terms of the contract of the 25th of September, 1890, with the Frankfort and Southeastern Railroad Company; that the Ann Arbor Railroad Company claimed not to be bound by the contract, and had given written notice to the complainant to that effect. Then follow the following paragraphs of the bill:

"6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7th, 1867, it filed with the Postmaster General its acceptance of the provisions of the act of the United States, passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort and Southeastern Railroad Company are binding on said Ann Arbor Company, and that

independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and Southeastern Railroad under the provisions of the statute of the United States."

Then, after averring that the Ann Arbor Railroad Company was taking possession of said wires and depriving the complainant of their use, and setting forth the value of the wires and that the damage arising from the loss of business would be large and incapable of accurate calculation, and that subsequent to the date of the taking possession of them by the defendant, the complainant had reconnected its lines, it asked for an injunction in the following prayer:

"To the end that said defendant, the Ann Arbor Railroad Company may answer this bill, but not under oath, answer under oath being hereby expressly waived, and that an injunction both preliminary and final may be issued out of and under the seal of this court, commanding the said Ann Arbor Railroad Company and all its officers and agents to absolutely desist and refrain from in any way interfering with the rights of complainant as alleged in this bill in the telegraph wires and poles running from Thompsonville to Frankfort, or its possession of the same, and that said defendant allow said complainant to reconnect said wires to its main line on the Chicago and West Michigan railroad, and to use said wires for its telegraph business in the same way as it was accustomed to use them before its rights were disturbed by said defendant, and that defendant be required to carry out said contract in good faith and for such other and further or different relief, or both, as may be agreeable to equity and good conscience."

Upon this bill thus framed summons was issued and served. The *defendant*, upon coming into court, filed its petition and bond, asking for the removal of the cause to the Federal Court, alleging that the plaintiff was a corporation organized under the laws of New York and is a citizen of the State of New York,

and that the defendant, the Ann Arbor Railroad Company, was a corporation organized under the laws of the State of Michigan and a citizen of said State, and as ground for removal

"that this suit is one arising under the Constitution and laws of the United States, and especially under the Act of Congress of July 24, 1866, now contained in Section 5263 of the Revised Statutes of the United States and the amendments thereto."

Upon this petition, the cause was removed, and thereupon in the Federal Court the defendant filed an answer setting forth the execution of a mortgage by the Frankfort and Southeastern Railroad Company long prior to the making of the contract of September 25th, 1890, and the issue of a large amount of bonds thereunder, and that the foreclosure and sales referred to in the complaint by means of which the defendant railroad company became the owner of the property were had under this prior mortgage, and that the prop- was sold for an amount insufficient to pay the indebtedness secured by said mortgage. Thereafter the railroad company filed a cross-bill which is material only in that it repeats some of the statements relating to the creation of this first mortgage, and asks that the contract be canceled, and held for naught and that an accounting may be had between the parties as to their respective interests and rights in and to the property in view of the contributions which had been made by the parties respectively, and that the Western Union Telegraph Company may be forbidden to interfere with the railroad company's interests in the telegraph lines. Thereafter a stipulation as to the facts was made, by which it was agreed that the statements in the answer respecting the execution and delivery

of the mortgage, and the foreclosure and sale under the prior mortgage are true. It was also stipulated that the statement of the bill respecting the reconnection of the telegraph lines with the other lines of the Western Union Telegraph Company after they had been cut and severed by the defendant, the railroad company, are true ; also that the above parties had been using and operating said lines of telegraph in substantially the same method provided by the contract in suit since the reconnection ; also that both parties had complied with the terms of the contract, and that the defendant company had bought with full knowledge of the rights and claims of the complainant under this contract with the Frankfort and Southeastern Railroad Company, and that, if the value of the telegraph line in controversy became material, evidence might be taken, and that this case might be submitted to the Court for final decree upon the pleadings, and this stipulation as to facts.

Upon this stipulation as tofacts Judge SEVERENS, to whom the case was submitted, found that the contract was a mere personal contract between the Western Union and the Frankfort and Southeastern Railroad Company ; that it was terminated by the foreclosure of the prior mortgage, and did not become a charge upon the defendant because of its purchase of the railroad upon the foreclosure of the mortgage, unless by some further agreement, the Ann Arbor Railroad Company voluntarily became a party to the agreement ; that, being a meer personal contract, it was terminated by the foreclosure of the prior mortgage, and that the telegraph company had a right to remove the personal property which, by the terms of the contract, was to

belong to it, and which was placed upon the property of the Ann Arbor Railroad Company. An appeal was taken from this decree to the Circuit Court of Appeals, which sustained the contention of the railroad company that the foreclosure of the prior mortgage terminated the contract, and affirmed the decree below. Thereupon the telegraph company took an appeal to the Supreme Court of the United States.

When it came into the Supreme Court, that court *sua sponte*, raised the question as to whether the suit as brought by the telegraph company in the State Court, presented upon the bill filed, a right under the Constitution and laws of the United States, as averred in the railroad company's petition for removal, and respecting this Chief Justice FULLER says:

"Defendant's application to remove, therefore, was based on the averment that the suit arose 'under the Constitution and laws of the United States.' Whether it did so arise depended on complainant's statement of its own case. Tennessee v. Bank, 152 U. S., 454. And the sixth and seventh paragraphs of the bill contain all that defendant could have relied on as bringing the case within that category. These paragraphs were to the effect that complainant had accepted the provisions of the Act of Congress of July 24, 1866, and that independent of the contract it had 'a right to maintain its telegraph line on what was formerly said Frankfort & Southeastern Railroad under the provisions of the statute of the United States."

"The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings and the prayer was for an injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by the defendant, 'and that defendant be required to carry out said contract in good faith' and for general relief."

Then follows the paragraph which is relied upon by our opponents, viz:

"It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.'" *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 U. S., 1. In that case Mr. Chief Justice WAITE further said:

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

Then recurring to the question whether the bill of the Telegraph Company did set forth a dispute or controversy under the Constitution or Laws of the United States as required in good pleading, and concluding that paragraphs six and seven of the bill (quoted *ante*), did not meet this requirement, and that such meaning was not intended by the pleader, the Chief Justice says:

"As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction. But it was argued that by virtue of the statute

the telegraph company was possessed of a public character and was discharging public duties, and that although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the Circuit Court should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the Court. It is sufficient to say that the bill was not framed in that aspect, and though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. And it is entirely clear that there were no averments in the bill in respect of this contention which would bring the case within the category of cases arising under the Constitution or laws of the United States so that jurisdiction could be held to have rested on that ground."

Therefore the decree was that the decree of the Circuit Court of Appeals and of the Circuit Court should be reversed and the cause remanded to the Circuit Court with direction to remand it to the State Court.

Inasmuch as the decision of the Court was to the effect that the bill was one for the specific performance of the contract set up in the bill and inasmuch as no case was stated in the bill under the Act of Congress of July 24, 1866, nor attempted to be so stated, it is clear that the decision of the Supreme Court of the United States was simply that it was without jurisdiction to hear and determine the case because the removal of the case from the State Court was not justified by any provision of law.

Postal Telegraph and Cable Co. vs. Cleveland, &c., Railroad Co.

The case of Postal Telegraph and Cable Company vs. Cleveland, &c., Railroad Company (94 Fed. Rep., 234) will also probably be relied upon as a direct decision under the Act of July 24, 1866, in support of the railroad company's contention; but it is to be noted that this decision proceeds entirely upon the basis of Chief Justice WAITE'S statement in Pensacola Telegraph Co. vs. Western Union Telegraph Co. (*supra*) and does not attempt to add anything to that case, but first construing the dictum of Chief Justice WAITE to mean that the right of way of a railroad company was comprehended in the phrase "private property," and that the Act of 1866 did not authorize the compulsory acquisition of "private property," Judge RICKS accepts the dictum as a binding adjudication, and therefore the decision adds nothing to the force of the argument for this Court.

Telegraph Co. vs. Texas.

(Oct., 1881.)

The cases which assert, or, in their logic, necessarily imply a different doctrine, are numerous. Very shortly after deciding the case of Pensacola Telegraph Company vs. Western Union Telegraph Co., Chief Justice WAITE announced the opinion of this Court in the case of Telegraph Company vs. Texas, 105 U. S., 460. This was a case involving the right of the State of Texas to impose a tax upon messages sent by the Western Union Telegraph Company from Texas into other

States and Territories, and this Court through Mr. Chief Justice WAITE held this doctrine as applicable to telegraph companies:

"A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

"Congress, to facilitate the erection of telegraph lines has by statute, authorized the use of the public domain and the military and post-roads, and the crossing of the navigable streams of the United States for that purpose. As a return for this privilege, those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business, at rates to be fixed by the Postmaster General. Thus, as to government business, companies of this class become government agencies.

"The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

The Court held that the State tax, so far as it was a tax on interstate messages and on government messages was absolutely void.

To same effect are following cases:

Ratterman vs. W. U. Telgh. Co., 127 U. S., 411.

Leloup vs. Mobile, 127 U. S., 640.

W. U. Telgh. Co. vs. Alabama, 132 U. S., 473.

Telegraph Co. vs. Massachusetts
(March 19, 1888.)

In 125 U. S., 530, the question of the effect of the Act of Congress came again before this Court, in the case of Western Union Telegraph Company vs. Attorney-General of the Commonwealth of Massachusetts, in which Mr. Justice MILLER delivered the opinion of the Court. This case raised the question as to the validity of a system of State taxation by which the value of the property owned and used by the telegraph company within the State of Massachusetts was ascertained by comparing the length of its lines in that State with the length of its entire lines and taking the mileage proportion of the value of the entire lines. It was claimed that this was in effect a taxation upon the Federal franchise which had been given to the telegraph company by the Act of Congress of July 24, 1866, and was in violation of the rights conferred upon that company by that act; that it had the right to exercise its functions of telegraphing over such portions of its lines as are located upon the military and post-roads of the United States, without being subject to taxation therefor by the State authorities. Answering this contention and upholding the right of the State to tax, Mr. Justice MILLER said:

"*While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads or stop the use of them after they were placed there,* nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended

by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of another State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. * * *

"*This authority of the Government gives to this telegraph company, as well as to others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post roads of the United States.*"

Then after upholding the tax because, although nominally upon the shares of the capital stock of the company, yet it was in reality upon the property owned and used by it in the State of Massachusetts, he comes to consider an injunction which had been granted in the case in the Court below against the operation of the lines because of the non-payment of the tax, such injunction being the method prescribed by the statutes of Massachusetts, for the enforcement of the tax which the Court had held valid. As to this he says :

"The effect of this injunction, if obeyed, is utterly to suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.' It is found in this case that 2334.55 of the company's lines out of 2833.05 on which this tax is assessed are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

"If the Congress of the United States has authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly

held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of sec. 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of taxes by the decree of the court awarding it, the injunction is erroneous.

"In holding this portion of section 54 of chapter 13 of the Massachusetts to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration and any other appropriate remedy in chancery."

St. Louis Case.

(March 6, 1893.)

The Supreme Court of the United States had occasion to consider the Act in another phase in St. Louis vs. Western Union Telegraph Co. (148 U. S., 92). The question arose under an ordinance requiring every telegraph company within the city to pay for each pole occupying the streets of the city the sum of five dollars per annum for the privilege of using the streets, alleys and public places. Suit was brought to recover the sum of $22,000 for poles of the Western Union Telegraph Company located upon the streets. The case was tried in the Circuit Court without a jury, and judgment was rendered in favor of the defendant, the Court holding that the burden was a tax which the city had no authority to impose; and the City by writ of error brought the case to the Supreme Court of the United States. In the opinion Justice BREWER thus

considers the rights of the telegraph company under the Act of Congress of July 24, 1866:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corpora-

tion of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated " (p. 101).

Considering the question of the amount fixed by the ordinance which was claimed to be unreasonable, unjust and excessive, the justice observes further by way of conclusion :

" Indeed it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; *that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is in this respect reasonable compensation for the space in the streets thus exclusively appropriated; it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the Courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city* " (p. 104).

The question was brought before the Court again upon re-hearing of the same case of St. Louis vs. Western Union Telegraph Co. (149 U. S., 465), and this Court, speaking through Justice BREWER, re-asserted the right of the city to secure reasonable compensation for the *property* which is occupied by the telegraph company by reason of the fact that under the peculiar provisions of the Constitution of Missouri, constituting the City of St. Louis to a certain extent an *imperium in imperio*, the City of St. Louis was the owner of the streets, and as such entitled to control and regulate

their use; and, therefore, the language used in 148 U. S., in the decision of the case, and cited *ante*, is properly applicable to the City of St. Louis, as the City stands in place of the State as the owner of such public property. The essential feature, however, of the decision, to wit: the proposition that the State or the City, although the owners of the street or highway, cannot deny the occupation thereof by a telegraph company vested with the powers conferred in the Act of July 24, 1866; that all they can insist upon as against such occupation by the telegraph company is reasonable compensation for the space in the streets occupied, or exclusively appropriated by the telegraph company; and that, in the determination of the amount of the reasonable rental or compensation for the space thus occupied, the judgment of the city or state is not final, but the question of amount of compensation is one for the courts, is reaffirmed.

This however is only another form of words for expressing the result of an appropriation of the property rights of the city in its streets by the exercise of the right of Eminent Domain and that if the parties differ, the Courts must under the Act of 1866, determine what is a reasonable rental or compensation. An appropriation is only an enforced sale in which appeal is made to the courts to settle the price of the property purchased by the State against the will of its owners. Upon the question of the taking and its propriety the legislative decision to take the property is conclusive (Boom Co. vs. Patterson, 98 U. S., 403). Upon the question of compensation neither the decision of the legislature nor of the owner of the prop-

erty is final. That is a judicial question which the Courts are alone competent to decide.

Monongahela Navigation Co. vs. United States, 148 U. S., 312, 327.

Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 571.

Union Pacific Case

(Nov. 18, 1895).

The court had occasion again to consider the meaning of the Act of July 24, 1866, in the case of the United States vs. Union Pacific Ry. Co. and the Western Union Telegraph Co. (160 U. S., 1). This was a suit brought by the United States against the Union Pacific Ry. Co. under the provisions of the act approved August 7, 1888, amendatory and supplemental of the charter of that company requiring the subsidized Pacific railroad companies to operate their own telegraph lines by their own employees, and requiring the Attorney-General of the United States to institute proceedings to set aside all contracts which would interfere with the operation by the railroad companies of their own telegraph lines in accordance with the provisions of the amendatory and supplemental Act. Among the contracts thus involved was a certain contract of October 1st, 1866, under which the Western Union Telegraph Company had constructed telegraph lines along the railroad from Kansas City to Denver, which contract was claimed to be fully justified by the provisions of an act approved July 2, 1864, known as " the Idaho Act," and respecting the construction and effect of which Mr. Justice HARLAN says :

" If, however, it be contended that this is not the correct interpretation of the Idaho Act, upon what

ground can it be claimed that any arrangement could be made under the Idaho Act, after the passage of the Act of July 24, 1866, that was inconsistent with the latter Act? *Can it be said that, after the passage of the Act of 1866, and while it was in force, a railway company operating a post road of the United States could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provision of that act? These questions can be answered only in one way, namely, that every railroad company operating a post-road of the United States, over which commerce among the States is carried on, was inhibited, after the Act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operation. The object of that Act was not only to promote and secure the interests of the Government, but to obtain for the benefit of the people of the entire country every advantage in the matter of communication by telegraph which might come from competition between corporations of different States.* It was very far from the intention of Congress by any legislation to so exert its power as to enable one telegraph corporation, Federal or State, to acquire exclusive rights over any post-road, especially one for the construction of which the aid of the United States had been given, and the use of which was, to some extent, under the control of the National Government" (p. 44).

Then, after the consideration of some other contracts he says, at page 49:

"And we may add what has been said in reference to the prior agreements of 1866, 1869 and 1871, namely, *that no railroad company operating a post road of the United States over which interstate commerce is carried on, can, consistently with the Act of July 24, 1866, bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a State, which accepts the provisions of that Act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.*"

Conclusions from Foregoing Cases.

These decisions definitely establish certain clear and incontestable principles as to the application and meaning of this Act of July 24, 1866. They decide:

1. That the telegraph company accepting the provisions of this act is a direct agency of the Government of the United States and is also "an instrument of foreign and interstate commerce" (Telegraph Co. vs. Texas; Pensacola Case, *supra*, Massachusetts Case, *supra*).

2. That the post-roads of the United States are made subject to occupation and use by such telegraph company as such public agency of the Government of the United States by this act of Congress (Pensacola Telegraph Co. vs. Western Union Telegraph Co.).

3. That the owner of such post-road cannot arbitrarily prohibit the occupation and use by such telegraph company under the conditions and restrictions named in the act, but such owner is entitled to reasonable compensation for the property ar the use of the property which is occupied, and cannot arbitrarily exclude the telegraph company from such occupation and use (St. Louis vs. Western Union Telegraph Company).

4. That in the determination of the amount of such reasonable compensatien to be paid for such occupation and use, the determination of the owner of the property is not conclusive nor binding upon the telegraph company, but that the courts may determine the amount of such compensation upon hearing and proof (St. Louis vs. Western Union Telegraph Company).

5. That by no form of agreement or stipulation can the owner of such post-road prohibit any telegraph company which has accepted the provisions of the Act of Congress of July 24, 1866, from occupying pursurnt to its provisions and under its restrictions such post-road with its telegraph lines and maintaining and operating the same thereon (United States vs. Union Pacific Ry. Co.).

These propositions are mere restatements of the principles which have been thus clearly decided by this Court, and their logic necessarily leads us in the determination of the fundamental question in this case to but one conclusion, viz., that the Act of July 24th, 1866, grants a right upon all the post-roads of the United States to a telegraph company accepting its provisions upon payment of reasonable compensation, to be fixed by proper proceedings in the Courts.

In taking up for consideration the nature of the procedure to be adopted to enforce the rights granted and conferred by the Act of July 24, 1866, let us look first at some cases which have arisen in the Federal Courts, and the manner in which they have dealt with this problem. These principles have been variously applied by the Federal courts, and we believe under the decisions no exclusive method of procedure to enforce and secure to the telegraph company the benefit of the provisions of the act has been adopted. The mode of procedure to fix the amount of compensation may be varied to meet the requirements of each case.

MODE OF PROCEDURE TO ENFORCE THE RIGHTS GIVEN BY THE ACT OF 1866, AND FEDERAL CASES RELATING THERETO.

Postal Telegraph-Cable Co. vs. Southern Railway Co.

(Sept. 9, 1898)

Thus in Postal Telegraph-Cable Co. vs. Southern Railway Company (89 Fed. Rep., 190), SIMONTON, J., secured to the telegraph company, the complainant in that case, its rights under the Act of Congress, by resorting to the procedure authorized by the statute of North Carolina for the purpose of ascertaining the amount of the compensation. Thus he says (p. 191):

"The respondent contends that there is no law in the State of North Carolina providing for the condemnation of land or the right of way for the use of telegraph companies. There is no doubt that any telegraph company incorporated by any State of the Union has the right to construct and maintain lines of telegraph along any railroad or other public highway in North Carolina, provided they be so constructed as not to obstruct or hinder ordinary travel thereon (Code N. C., 1883, Sec. 2007). Such right may be obtained from the railway company, owner of the land, franchise or easement therein by contract (Code N. C., Sec. 2008). The same Code (Sections 2009, 2010) provided that, failing to make such a contract, the telegraph company could, exercising the right of eminent domain, obtain the right of way desired, and the right to erect its poles, and establish offices, upon making just compensation therefor. *The same right to construct its lines along the right of way of post-roads of the United States is given under the act of Congress of 1866 to all telegraph companies accepting the provisions of that act (Rev. St. U. S., Secs. 5263, 5269); and the petitioner is one of the companies which has complied with all the requirements of this act, and has*

secured its privileges. But, notwithstanding this, before the privilege can be exercised upon the lands, the property of private persons or corporations, the consent of such persons must be obtained, or such proceedings must be had as will insure them just compensation. No act of Congress can give the right of taking private property for public purposes without first paying just compensation (Const. U. S., Amendment 5). And although section 8 of article 1 gives Congress power to establish post-roads, and to make all laws which may be necessary to carry this power into effect 'like all other powers granted to Congress by the Constitution, the power to regulate commerce is subject to limitations imposed by this instrument, among them that of the fifth amendment' (Monongahela Nav. Co. vs. U. S., 148 U. S., 325, 13 Sup. Ct., 622). *The mode or method of exercising this right of eminent domain is fixed by the laws of the several States.* Such mode or method is exclusive in its character in ascertaining the amount of just compensation to be allowed (see Roberts v. Railroad Co., 158 U. S., 1, 15 Sup. Ct., 756; Sweet v. Rechel, 159 U. S., 380, 16 Sup. Ct., 43). The Federal courts do not interfere with it, provided due process of law be furnished (Chicago, B. & Q. Co. v. City of Chicago, 166 U. S., 226, 17 Sup. Ct., 581). *This being the case we must look to the statute law of North Carolina alone for the mode of proceeding in the condemnation of lands or right of way—for the conduct of the procedure, and for the steps by which the just compensation is reached.* It is true that the purposes of the petitioner are greatly for the public benefit, that it is an important factor in interstate commerce, one of the agencies—and a most valuable agent—in interstate commerce, and that it is of most essential service to the citizen in time of peace and to the government in time of war. But the underlying proposition in our civilization and in Anglo-Saxon liberty is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property. And when he is called upon to surrender that property against his will, for a public purpose, he is entitled to all the safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain."

Then follows a discussion of the peculiar procedure provided by the statutes of North Carolina for ascer-

taining the amount of just compensation, but it is to be observed that the State legislation is resorted to for ascertaing the amount of compensation while the Act of Congress concerning with the legislation of the State is considered as conferring the ultimate right upon the telegraph company to enter upon the railroad. This case has a very direct application to the case at bar, because the equity bill in this case sets forth (Exhibit 26, Record, No. 199, p. 41; Record, No. 367, p. 38), proceedings at law instituted in the United States Circuit Court in the District of New Jersey, based upon the Act of Congress of July 24, 1866, and seeking to couple with such right under this Act the modes of procedure provided by the New Jersey statutes. Said law action (Exhibit 26 to the Bill) conforms to the modes of procedure prescribed by the statutes of New Jersey, as will be seen by the petition constituting said Exhibit 26 and the prayer thereof.

Chapter 53 of the Laws of New Jersey for the year 1900, is entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use." By Section 1 of the act it is provided:

"Whenever the proper officers of the State or of any county or of any municipal corporation, or of any other corporation, public or private, having power to take land or other property for public use, shall have determined to acquire land or other property, pursuant to authority conferred by law, and cannot acquire such land or other property by agreement with the owner, by reason of disagreement as to the price or legal incapacity or absence of the owner or his inability to convey a valid title, or to the lack of authority of the party determining to acquire the property to do so by agreement, or by reason of any other cause, the compensation shall be ascertained and paid in the manner directed by this Act."

Then follow in sixteen additional sections careful provisions (as was provided by the North Carolina statute and referred to by Judge SIMONTON) for the appointment of Commissioners, the hearing before the Commissioners and the determination of the compensation, together with full right of appeal from the decision of the Commissioners to a jury. Under the decision of Justice SIMONTON, above quoted, the Act of Congress gave the right, the State statute provided the procedure. The right being given by the Act of Congress, and the method of making that right effective by the New Jersey statute, we have all that is required to complete the acquisition of the needed property by the Telegraph Company.

Oregon Short Line Case.

(Judge BEATTY, June 19, 1900.)

The same question was solved in practically the same way in the case of the Postal Telegraph Cable Co. of Idaho vs. Oregon Short Line Railroad Co. 104 Fed. Rep., 623), by BEATTY, District Judge, sitting in Circuit. This was an action to condemn a right of way along the defendant railroad company's property, and upon this question Judge BEATTY says:

"Section 5263 of the Revised Statutes of the United States, enacted July 24, 1866, authorized any telegraph company to construct any telegraph line over the public lands and along military and post-roads, while Section 3964, enacted June 8, 1872, makes all railroads post-roads. The defendant procured practically all its right of way from the Government and built its road subject to the provisions of these statutes. It seems to me that they cut off discussion and determine the question involved in favor of the plaintiff. Moreover

numerous Courts have granted this right to telegraph companies against railroads, and in some cases where the railroads had purchased from citizens or had condemned the right of way, while here the defendant procured its right of way from the Government as a gift. It was, however, granted not so much as a favor to the defendant, but for the benefit of the public; and bearing this fact in mind, the right of way should still be used for the public good when it can be without detriment or even without material detriment to the defendant in the general use to which it is devoted. I hold that the plaintiff is entitled to the right of way asked, upon the payment of such damages as the defendant will suffer. * * * The statutes of the State and United States above referred to seem so clearly to give the plaintiff the relief it asks, and which is hereby given, that it is considered unnecessary to enter into any lengthy discussion or citation of the numerous authorities upon the question."

Oregon Short Line Case.

(Judge KNOWLES, March 22, 1902.)

The question was also before the Circuit Court of Montana, in Postal Telegraph-Cable Co. vs. The Oregon Short Line Company (114 Fed. Rep., 787), a proceeding for the condemnation of a right of way along the Oregon Short Line Railroad in the State of Montana, and Judge KNOWLES says :

" The plaintiff, on the argument before this Court, claimed the grant of a right of way over and along the defendant's railroad right of way, under and by virtue of the provisions of Sections 5263 to 5269 of the Revised Statutes of the United States. Evidence was introduced to show that the plaintiff had accepted the conditions named in the aforesaid statutes. Section 5263 of the statutes (*supra*), reads as follows :

" 'SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States over

and along any of the military post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.'"

It will be seen by this statute that the right is given to any telegraph corporation, organized under the laws of any State, to construct and maintain its telegraph line over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by law. Such lines must not interfere with the ordinary travel on such military or post-roads. By Section 3964 of the Revised Statutes of the United States, all railroads such as that operated by the defendant in this State have been and are declared to be post-roads. If this statute is applicable to this case, then the Act of Congress itself determines whether the power of eminent domain should be put in motion for the purposes named and whether the exigencies of the occasion and the public welfare required or justified its exercise. In the case of Boom Company vs. Patterson (98 U. S. 403), the Supreme Court, speaking by Mr. Justice FIELD, said: **"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature and the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested."** * * * Although Congress had put *its right of eminent domain in motion* by granting to telegraph companies who complied with the following provisions of the statutes the right of way *over and along the post-roads* and determined the necessity for *using said ways for telegraph purposes*, it, at the same time imposed the condition that such use should not interfere with ordinary travel thereon; but there was the further constitutional limitation that, before such right of way could be so utilized, just compensation should be awarded therefor to the owners or proprietors thereof.

There would not appear to be any doubt, from the evidence presented in this case, that the telegraph lines, as proposed by the plaintiff, may be constructed over and along the defendant's said right of way, so as not to interfere with the ordinary travel thereon. In this grant to the telegraph companies, Congress, however, made no provision for assessment of damages arising out of the taking. In the case of Kohl vs. United States (91 U. S. 367), the Supreme Court held that an action could be maintained as a civil action at law to fix the damages arising from the taking of any property for a public use. The Court there said:

"It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not within the meaning of the statute, a suit at common law when initiated in a Court. It is an attempt to enforce a legal right."

In that case, after adverting to the fact that Congress had made no provision for the assessing of damages for property taken under the power of eminent domain, the Court said:

"But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law." * * * *

The views expressed in this opinion were affirmed in the above case of Boom Co. vs. Patterson.

"It would seem, then, that the plaintiff company had the right to proceed either in the State Court or in the Federal Court to ascertain the just compensation to which the defendant would be entitled for the amount of its railroad right of way taken for the plaintiff's telegraph line; and I might stop here, and proceed to determine the just compensation to which the defendant is entitled, were it not that it would seem in the suit brought here that the plaintiff appeals for its right, not to the power of eminent domain vested in the National Government, but to that power inherent in the State government. * * *

"In considering the act of Congress before quoted, it is evident that Congress was of the opinion that it would be right to appropriate *portions of any post-road for a telegraph line*, when such appropriation did not interfere with the ordinary travel thereon. Guided

by these opinions, I find in this case that the portions of the railroad right of way of the Oregon Short Line Railroad Company, in Montana, sought to be appropriated by the plaintiff to the uses named, is a proper appropriation, and a more necessary public use than that to which the defendant is devoting the same. This appropriation by the telegraph company of the right of way of the defendant must be confined, however, to that portion of the same not now actually used and required for railway purposes, and along a line which will not interfere with the ordinary use thereof for railway purposes."

It will be observed that the foregoing cases apply in one way the principles expressed in the decisions of this Court cited *ante*. They, however, resort to the procedure established by State statutes for the purpose of ascertaining the compensation, yet all of them construe the act of July 24, 1866, as giving the *right* to the telegraph company to enter upon and use the property of the railway company as a location for its telegraph lines, under and subject only to the conditions named in the act of July 24, 1866, and the duty to make compensation as provided in the 5th Amendment to the Constitution of the United States. They resort to the State statutes for the purpose of finding a procedure to ascertain and determine the amount of the compensation to which the railway company is entitled. In view of the provisions of the statutes of New Jersey, these cases are, therefore, in point, and justify the case which was brought by the Western Union Telegraph Company in the United States Circuit Court of New Jersey *at law* to ascertain the amount of that compensation.

But, while the procedure adopted in the foregoing cases was undoubtedly correct and justified by the decisions of this Court above cited, the insistence of

the telegraph company is that, even in case where no such State statute exists under the decisions of this Court, it was still clearly the right of the Western Union Telegraph Company to bring an action at law in the Federal Court for the proper district, or, in a proper case, by a bill in equity, to have the compensation determined.

Kohl Case

(Oct., 1875).

As to the right to institute a proceeding at law in a case such as this, the case of Kohl vs. United States (91 U. S., 367), is conclusive. Excluding for the moment the statute of New Jersey as to procedure, the case which has been brought by the Western Union Telegraph Company on the law side in the United States Circuit Court for the District of New Jersey is exactly in principle like the case of Kohl vs. United States. In that case a proceeding was instituted by the United States to appropriate a parcel of land in the City of Cincinnati. The statute authorizing the acquisition of a site for a post office simply authorized and directed the secretary of the treasury to purchase a central and suitable site in the City of Cincinnati for the erection of a building for the accommodation of the United States Courts, &c. In the appropriation act there was appropriated to commence the erection of a building the sum of $700,000, and "for the purchase, at private sale or by condemnation, of ground for a site therefor" the sum of $700,000; and by a subsequent appropriation act a further provision was inserted in the appropriation act for the purchase of a site for a

building for a custom house and post office, $750,000. No provision whatever was made for any proceeding to acquire title, no provision that the money should be paid for the site, nor any proceeding authorized to be instituted for the acquisition of the site unless implied from the authority to "purchase, at private sale or by condemnation." If appropriation was contemplated by Congress, it was implied as a result of the clear grant of the right to acquire, just as it is to be implied under the Act of Congress of July 24, 1866, from the clear, unqualified grant in the first section of that Act, of the right to construct, maintain and operate telegraph lines upon all post-roads.

With this, the sole legislation upon the subject, the United States District Attorney for the Southern District of Ohio prepared what is styled in the record of the case "an application" which he filed on the law side of the United States Circuit Court. The cause was entitled the United States of America, plaintiff, vs. In Lots No. 118, &c., in the City of Cincinnati, describing the boundaries of the same by streets. In this application the District Attorney set up the several acts of Congress, authorizing the Secretary of the Treasury to purchase a suitable site, and the further provision of the appropriation act by which a sum of money was set apart for the "purchase, at private sale, or by condemnation," of land for the purposes named in the original act. Then followed a definite description of the ground which had been selected by the Secretary of the Treasury, and the offer to purchase the same from the several parties who were thus alleged to be owners, and the failure to agree as to the value of the parcels with those owners, and the authorization there-

upon by the Secretary of the Treasury of the institution of this proceeding to obtain the title to the land for the public use of the Government of the United States. Then followed the detailed descriptions of the several subdivisions of the land, together with a statement of the persons who held or claimed to hold an estate, title or interest in each of such subdivisions. Following this statement and description—there being 24 lots in all—there was the prayer for the impanelling of a jury for inquiry and assessment of the compensation which the United States should pay for said property thus described and set forth, and asking that upon payment of the compensation equal to the sum so assessed and found by the jury, that the United States should be deemed to be vested with the title, to the land, and that the Court would distribute the sum paid to the parties designated as owners, as their interests might appear.

This is precisely the character of petition which was filed by the telegraph company in the United States Circuit Court for the District of New Jersey, and set up as exhibit 26 to the bill in equity in this cause. It follows the form adopted in the Kohl case in all essential particulars. The Circuit Court empannelled a jury and after a hearing took its verdict as to the value of the lots, and entered a judgment adjudging that the United States upon the payment of the amount found by the jury should be entitled to the lands for the purpose of a Post Office, United States Courts, etc. The defendants, the owners of the property, in that case, attacked this proceeding as one over which the United States Circuit Court for the Southern District of Ohio had no jurisdiction, alleging that no proceeding to condemn was

authorized by Congress, and that the application was filed entirely without authority of law and sued out a writ of error to this Court, from the judgment of the Circuit Court. Respecting this contention Mr. Justice STRONG, speaking for this Court, said:

"It is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true that directs the precise mode by which the contemplated condemnation should be effected, or which expressly authorized the proceeding in the Circuit Court to secure it. Doubtless Congress might have provided the mode of taking the land and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed by what tribunal or by what adjudication the ascertainment of the compensation should have been accomplished. The mode might have been by a commission, or it might have been referred to the Circuit Court; but this, we think, is not necessary. The investment of the Secretary of the Treasury with power to obtain land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the United States, jurisdiction of all suits at law or in equity when the United States or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs. If, then, a proceeding to take land for public use by condemnation may be a suit at common law, the jurisdiction of it is vested in the Circuit Court. That it is a 'suit' admits of no question. In Weston vs. Charleston (2 Pet., 464), Chief-Justice MARSHALL, delivering the opinion of the court, said: 'The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual obtains that remedy which the law confers. The modes of proceeding may be various, but if the right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit. A writ of prohibition has therefore been held to be a suit; so has a writ of right, of which the Circuit Court has no jurisdiction (Green v. Liter, 8 Cranch, 229); so is a *habeas corpus* (Holmes v. Jamison, 14

Pet., 564). When in the 11th section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature, at common law or in equity, was given to the Circuit Courts, it was intended to embrace, not merely suits which the common law recognizes as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity nor was it even a creation of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the Governments eminent domain and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi-judicial*. Certainly no other mode than a judicial trial has been provided. * * *

"But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit under the general grant of jurisdiction made by the Act of 1789."

The judgment of the Circuit Court was affirmed.

Additional Cases.

Boom Co vs. Patterson.

(Oct. 1878.)

The question was again before the Court in the case of Boom Co. vs. Patterson (98 U. S., 403), whereby a condemnation suit pending in the State Court was removed to the Circuit Court of the United States. The Boom Company, the condemning company, raised a question as to the jurisdiction of the Circuit Court, which is thus disposed of by Mr. Justice FIELD:

"The proposition of the company on this head of jurisdiction is this: That the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating property is concerned. The right of eminent domain; that is, the right to take private property for public use, appertains to every independent government, and it requires no constitutional recognition. It is an attribute of sovereignty. The clauses found in the constitution of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by the act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested, but the subject matter of the right is one that appertains to the sovereignty. When the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of proceedings before the court between the parties—the owners of the land on the one side and the company seeking the appropriation on the other—there is a

controversy which is subject to the ordinary incidents of a civil suit and its determination derogates in no respect from the sovereignty of the State."

United States vs. Jones.

(Dec. 10, 1883.)

The case of the United States vs. Jones (109 U. S., 513) was a proceeding by the United States to acquire the property of a corporation known as the Green Bay and Mississippi Canal Company. Under an Act of Congress, the Secretary of War was authorized to join with the company in the appointment of a board of arbitrators to determine the value of the works sought to be acquired by the United States. After the acquisition of the works by the United States, the State of Wisconsin passed a law providing for the ascertainment of compensation to be made for damages caused by overflow from some of the dams which were maintained by the improvement. Commissioners were appointed, before whom the parties appeared, the United States being represented by counsel retained by the Department of Justice. The Commissioners awarded the petitioner the sum of $8,000, and from that award an appeal was taken to the Circuit Court, where the case was brought before a jury. Before the impaneling of the jury the defendants objected to the action of the Court upon the ground (1) that it had no jurisdiction of the defendants; (2) it had no jurisdiction to try a case to which the United States was a party; (3) that the act of Congress was unconstitutional in assuming to confer upon said Court the authority to try a case to which the United States was a party.

The trial resulted in a verdict for the plaintiffs and

this judgment was taken upon writ of error to the Supreme Court of the United States. Upon the question we are considering Mr. Justice FIELD, delivering the opinion of the Court, says :

" The position of the counsel of the United States in the court below, as we understand it, was substantially this ; That the power vested in the Federal Government to take private property for the public use of the United States is, in its nature, exclusive, and its exercise by any State is, therefore, prohibited as completely as though the prohibition were expressed in terms ; that the power cannot, therefore, be delegated to the State of Wisconsin ; *that the ascertainment of the compensation is involved in the exercise of the power as a necessary part of it,* inasmuch as there can be no lawful taking until compensation is made ; and that the act of Congress transferring to the State board and State court the function of ascertaining the value of the property taken and the amount of compensation to be made is therefore invalid.

" *There is in this position an assumption that the ascertainment of the amount of compensation to be made as an essential element of the power of appropriation ; but such is not the case. The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government.* It is an incident of sovereignty, and, as said in Boom Company v. Patterson 98 U. S., 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution and in the constitutions of the several States for just compensation for property taken is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. * * * *But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.*

" The proceeding for the establishment of the value of the property and subsequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking ; and it may

be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with the opportunity to the owners of the property to present evidence as to its value and to be heard thereon. *Whether the tribunal shall be created directly by an act of Congress or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion.* Undoubtedly it was the purpose of the Constitution to establish a general government independent and in some respects superior to that of the State governments—one which could enforce its own laws, through its own officers and tribunals; and this purpose was accomplished; that government can create all the officers and tribunals required for the execution of its power. Upon this point there can be no question."

Kohl vs. United States, 91 U. S.

High Bridge Lumber Co. vs. United States.

(July 2, 1895.)

In the case of High Bridge Lumber Company vs. United States (69 Fed. Rep., 320) the question of the proper method of procedure came before the Circuit Court of Appeals for the Sixth Circuit in a proceeding by the United States against the High Bridge Lumber Company for the condemnation of certain lands for a lock and dam on a navigable river. The proceedings were had in the United States District Court with reference to lands, in the State of Kentucky, which had no statute relating to the condemnation of lands for such purposes, and it was held that the compensation to be awarded must be determined by the principles of the common law, and that no allowance for consequential damages could be made. The suit in the case was instituted by a petition filed in the District Court of the United States for the District of Kentucky, under an

act of Congress which authorized proceedings to be instituted in the name of the United States in the United States Circuit Court or District Court of the district where the real estate was located, such proceedings to be prosecuted according to the laws relating to suits for the condemnation of property for States where the condemnation proceedings may be instituted. Upon this subject LURTON, J., announcing the opinion of the Court, says:

"In this case there is no statute prescribing the damages to be assessed. The Kentucky statute concerns only the damages which are to be allowed as a condition upon which railroad corporations are allowed to condemn lands or materials necessary in railroad construction. The provision in the Act of Congress heretofore cited, requiring condemnation proceedings to be prosecuted 'in accordance with the laws relating to suits for the condemnation of property of the States where the proceedings may be instituted', has no application to a condemnation for river improvement purposes instituted by the United States, other than to require that the practice and proceeding shall 'as near as may be' be in accordance with like causes in the courts of record of the State within which such Circuit Court or District Court is held. It is not to be conceived that Congress intended that a legislative requirement giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when the United States undertakes to condemn lands necessary for the improvement of navigation. The right of eminent domain is a common-law right, inherent in every sovereignty unless denied by its fundamental law. It is a right which exists in the Federal Government, and may be exercised by it within the States, so far as necessary for the enjoyment of the powers conferred upon it by the Constitution (Cooley, Const. Lim., 526; Kohl v. United States, 91 U. S., 367; U. S. v. Jones, 109 U. S., 513). The only constitutional limitation upon this right of eminent domain is found in the provision which forbids the taking of private property for public purposes without just compensation. That Congress may delegate to such tribunals

power to fix and determine the amount of compensation to be paid by the United States for private property taken by them for public purposes, or adopt the rules of law prescribed by the State for that purpose, is not to be doubted."

Common Law Procedure not Exclusive.

While the foregoing authorities clearly establish the doctrine that compensation may be ascertained in common-law proceedings in the United States courts or by the adoption in such court of the machinery provided by the State statute, yet these courts are not confined to such proceedings, and in proper cases, the compensation may be ascertained in proceedings in equity, and the court may decree that upon the payment of such compensation, the party shall have the right to maintain the improvement in question. The principles upon which the courts will proceed in thus adjudicating have been very clearly outlined by some of the Federal courts, adopting in that respect, however, the same principles that have been applied in the State courts.

McElroy vs. Kansas City.
(August, 1884).

Justice BREWER, when Circuit Judge, had occasion to consider the duty of a chancellor, in a case of that sort, and very elaborately outlined the principles, which should control his action, in the case of McElroy vs. Kansas City (21 Fed. Rep., 257). In that case the complainant was the owner of a lot on the corner of two streets in Kansas City. The grade of the street had been established by the city

by an ordinance, the carrying into execution of which would leave the lot of the complainant many feet above Sixth street, and seriously damage the value of the complainant's property. Under the Constitution of Missouri it was provided that private property should not be taken, *or damaged* for public use without just compensation. The Legislature had made no provision for procedure by which the city could ascertain the amount of the damage in a case of this character, and it was insisted on the part of the complainant that this provision of the Constitution was not self-executing; that the city, having no statutory authority to condemn, or to proceed in the Courts to ascertain the extent to which its operations would damage the lot in question, was powerless to go forward with the improvement, and that the only thing for the Court to do was to grant a perpetual injunction against the city's action, and thus tie up, and prevent a public improvement until the Legislature should act.

It will be observed that there was not here, as in the case at bar, great public interests involved, in the way of intercommunication, and possible suspension of the functions of an agency of the Federal Government, but simply the question of action by one of the municipal subdivisions of the State affecting at most a very small section of the public. BREWER, Circuit Judge, lays down the following general propositions as controlling in the decision which he reached (p. 261) :

"FIRST. A Chancellor, in determining an application
" for an injunction, must regard not only the rights of
" the complainants which are sought to be protected,
" but the injuries which may result to the defendant or
" to others from the granting of the injunction. If the

" complainant's rights are of a trifling character; if the
" injury which he would sustain from the act sought
" to be enjoined can be fully and easily compensated,
" while, on the other hand, the defendant would suffer
" great damage, and especially if the public would
" suffer a large inconvenience if the contemplated act
" was restrained, the lesser right must yield to the
" larger benefit; the injunction should be refused, and
" the complainant remitted to his action for damages.
" This rule has been enforced in a multitude of cases,
" and under a variety of circumstances, and is one of
" such evident justice as needs no citation of authori-
" ties for its support.

" SECOND. When the defendant has an ultimate right
" to do the act, sought to be restrained, but only upon
" some condition precedent, and compliance with the
" condition is within the power of the defendant, in-
" junction will almost universally be granted until the
" condition is complied with. This principle lies at
" the foundation of the multitude of cases which have
" restrained the taking of property until after the pay-
" ment of the compensation, for in all those cases the
" Legislature has placed at the command of the de-
" fendant means for ascertaining the value of the
" property. In those cases the courts have seldom
" stopped to inquire whether the value of the property
" sought to be taken was little or great, whether the
" injury to the complainant was large or small, but
" have contented themselves with holding that, as the
" defendant had full means of ascertaining such com-
" pensation, it was his first duty to use such means,
" determine and pay the compensation, and until he
" did so the taking of the property would be enjoined.

" THIRD. Where the defendant has an ultimate right
" to do the act sought to be enjoined upon certain con-
" ditions, and the means of complying with such
" conditions are not at his command, the courts will
" endeavor to adjust their orders so on the one hand
" as to give to the complainant the substantial benefit
" of such conditions, while not restraining the defend-
" ant from the exercise of its ultimate rights. Thus,
" in the case at bar, the defendant has of course the
" ultimate right to grade this street. As a condition
" of such right is a payment of damages, but it has no
" means of ascertaining those damages; no tribunal
" has been created, no provision of law made, for their
" ascertainment. Hence, if possible, the Court should

" provide for securing to the defendant this ultimate " right, and at the same time give to the complainant " the substantial benefit of the prior conditions.

" FOURTH. In applying the rule first stated to a case " like the one at bar, the Court should have principal " regard to three matters:

" (1) The amount of injury to the complainant. It " is obvious that a grade of a single foot in front of a " city lot would work but trifling injury, while on the " other hand the grade might be such as practically to " destroy the value of the adjacent property. In the " one case it would seem a great hardship to tie up a " public improvement because of some trifling injury " to the complainant, the amount of which injury was " not attainable by any established means, and there- " fore that the party might justly be left to his action " for damages; while in the other case the Court might " well insist that the value of complainant's property " should not be wholly wrecked until such value has " been paid to him.

" (2) The Court will consider the solvency of the " defendant. If some irresponsible corporation should " seek, in the exercise of the power of eminent do- " main, and under the guise of the contemplated pub- " lic improvement, to do serious damage to property, " the Court should promptly say that the owner was " not bound to take the chance of collecting his dam- " age from such a corporation, and imperatively re- " quire the prior adjustment and payment of such dam- " ages; while if the party attempting the improve- " ment was a corporation of established and permanent " solvency, the Court might say that the complainant " would run little risk in pursuing simply his action for " damages.

" (3) If the improvement was one of great public " importance the Court would justly regard that as a " reason for not lightly interfering with the work, while " if the improvement was more of a personal specula- " tion and for private gain, the prior protection of the " complainant would be most rigorously insisted on. " Thus, if in the centre of a large and thriving city like " the defendant, some improvement was contemplated " which the necessities of business proclaimed to be " urgent, the Court on no slight consideration should " interfere to delay or restrain it; while on the other " hand, if it was some matter in the outskirts of the " city, having obviously principal reference to the pri-

" vate speculation of the individual, and of no earnest
" or urgent demand of public good, the attention of
" the Court would be properly directed to the full pro-
" tection of the complainant's prior right. I think
" such considerations as these, and others of a similar
" nature, when properly regarded by the Courts, will
" afford ample protection to individual rights without
" unnecessary interference with needed public improve-
" ments; and that, until the legislature makes suitable
" provision for the ascertaining of damages to property
" not taken, the Courts should be guided by them in
" determining all applications of this nature for an
" injunction.

" Now, looking at the facts of this particular case, it
" is evident that the injury to complainant's lot will be
" serious; that the solvency of the defendant is un-
" questionable, and that any judgment for damages
" against it can be easily collected; and also that the
" improvement is not one of pressing public necessity,
" but in the outskirts of the city, and having reference
" mainly to private benefit and individual speculation.
" I think, therefore, that the complainant is entitled to
" a restraining order, but at the same time it should
" not be absolute and unconditional.

" The section of the Constitution provides that this
" compensation shall be ascertained by a jury or Board
" of Commissioners of not less than three freeholders.
" It is within the power of a Court of Chancery to pro-
" vide a Board of Commissioners. The order, there-
" fore, will be that upon the giving a bond in the sum
" of $3,000, and the filing of a stipulation to accept
" such damages as shall be ascertained in the manner
" herein provided in full satisfaction of all claims
" against the defendant, the defendant will be restrained
" from grading said street.

" Provided, that at any time the defendant may,
" upon 20 days' notice, apply to either of the Judges
" of this Court for the appointment of a Board of
" Commissioners of three freeholders to ascertain and
" report the amount of damages which complainant
" will sustain by reason of the grading of said street,
" and upon the payment of the damages so reported
" by such commissioners the injunction will be va-
" cated."

Osborne vs. Missouri Pacific Ry. Co.
(January 16, 1893.)

The principle of this decision is expressly approved by the Supreme Court of the United States in Osborne vs. Missouri Pacific Railway Company (147 U. S., 248). This case was an action by an abutting owner upon a street in the City of St. Louis, and its purpose was to enjoin the construction of a track along Gratiot Street, whereby it was claimed that great, unascertainable and irreparable damage would be caused the complainant's business. Upon this question we are considering. Chief-Justice FULLER, delivering the opinion of the Court, says (p. 259):

"In McElroy vs. Kansas City (21 Fed. Rep., 267), which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. Justice BREWER, then Circuit Judge, considered under what circumstances the Chancellor could grant such relief. It was the rule that, if the injury which the complainant would sustain from an act sought to be enjoined could be fully and easily compensated at law, while on the other hand the defendant would suffer great damage, and especially if the public would suffer large inconvenience if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages. *If the defendant had an ultimate right to do the thing sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but, if the means of complying with the condition were not at the defendant's command, then the court would adjust its order so as to give the complainant substantial benefit of the condition while not restraining the defendant from the exercise of his ultimate rights.* Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of the property for public

use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which the complainant would sustain, upon the payment of which the injunction would be vacated.

"Assuming, as the Circuit Judge did, and as we prefer to do in disposing of the case upon this record, that if the complainant had sustained damage it had a cause of action, we, nevertheless, entirely agree that the bill was properly dismissed.

"Evidence was adduced of the extent and character of the alleged damage, although the Circuit Court did not undertake to go into the question of the amount, and the result was that the court concluded that the use of the track had not seriously obstructed, and would not in the future seriously obstruct, access to complainant's premises, and that the lessening of the market or rental value of the property was in any event small; that a jury might find that no damage had been sustained, or that it was inconsiderable, and that there was no proceeding which the defendant could take to obtain an estimate of damages, if any, while the complainant had an adequate and simple remedy by action of law.

"The prayer was for an unconditional injunction, and, although this was coupled with a prayer for general relief, a decree different from that specifically prayed for could hardly have been awarded under the general prayer, as the averments of the bill were not introduced for that purpose; and, besides, the complainant explicitly disclaimed upon the hearing any desire for the ascertainment of damages in this proceeding.

"The statutes of Missouri provided for the assessment of compensation for the taking of property for public use, but not for such assessment where the property was merely damaged and complainant occupied the position of seeking by an absolute injunction to compel the defendant to pay such an amount as accorded with his own judgment upon that matter. It may be true that, if this had been a case where compensation as such was demandable, the defendant, by filing a cross-bill, could have obtained an order such as was entered in McElroy vs. Kansas City, but it is useless to indulge in speculation in this regard."

Additional Cases.

The same doctrine is applied in a very recent case, New York City vs. Pine (185 U. S., 93), citing in the opinion, among others, some of the elevated railway cases decided by the Court of Appeals of New York, in which the same doctrine as to the power of a court of equity to determine the compensation upon the same principle as in a condemnation case is applied. (see, also, Galway vs. Elevated Railway Co., 128 N. Y., 132; Shepard vs. Elevated R. R. Co., 117 N. Y., 442).

St. Paul, Minneapolis and Manitoba Ry. Co. vs. Western Union Telegraph Co.

(November 3, 1902.)

An instructor case upon the application of the Act of Congress of July 24, 1866, is a recent decision of the United States Circuit Court of Appeals for the 8th Circuit, in St. Paul, Minneapolis & Manitoba Ry. Co., appellant, vs. Western Union Telegraph Co. and the Northwestern Telegraph Co., appellees, 118 Fed. Rep., 497. This case affirms not only the power of a court of equity, as announced in the opinion of Justice BREWER and in the subsequent cases, cited *ante*, to effect what may be called an equitable condemnation, but in that it sustains the power of a court of equity to do so in favor of a telegraph company which has accepted the provisions of the Act of Congress of July 24, 1866, and by virtue of the grants to such company in the first section of that Act. The question arose in this case in this form. A contract for ten years had been entered into between the railroad

company, and the telegraph company for the construction and operation of telegraph lines along the railway. The contract was absolutely silent as to the ownership of the telegraph lines after the termination of the period named in the contract. The railway company claimed that under the doctrine of annexation the telegraph lines became its property on the termination of the ten-year period named in the contract, and filed its bill in the United States Circuit Court for the District of Minnesota to have the telegraph lines which had been constructed during the time named in the contract decreed to be its property. The telegraph company filed a cross-bill, setting up among other things, the Act of Congress of July 24th, 1866, its acceptance of the provisions of that Act, and its obligations to the United States Government thereunder, its construction of the lines and its ownership of them, and that by virtue of the provisions of the Act of Congress of July 24th, 1866, it was entitled to continue to maintain and operate its telegraph lines over and along the right of way of the railway company, subject only to the provision of making a reasonable and just compensation for the property occupied by its telegraph lines, and that such occupancy would not interfere with the ordinary travel upon such railways.

There was thus presented upon this cross-bill the question of the ultimate right of the telegraph company to appropriate a right to continue its telegraph lines along the railroads of the appellant, by virtue of the provisions of the Act of Congress of July 24, 1866. The Circuit Court disposed of the case in favor of the telegraph company upon other questions without reaching the question raised by

the cross-bill of the defendant telegraph company; but in the Circuit Court of Appeals Justice THAYER, announcing the opinion of the Court, considered this question, and granted relief which could only have been granted upon the principle that by the Act of July 24, 1866, there was given to the telegraph company the right to appropriate the continued right to maintain and operate its telegraph lines over and along the railways of the complainant. He says:

"We are of opinion that it is competent for a court of equity, in the situation which confronts us in this case, to fix the compensation to be paid to the Railway Company for the use of its right of way for the future support and maintenance of the telegraphic lines which were erected thereon subsequent to July 1, 1882, under the provisions of contract 'B'; and that this power should be exercised if it so happens that no agreement can be reached by the parties themselves with respect thereto, and the Railway Company shall insist in future upon their being removed from its premises. Telegraph companies are recognized everywhere as common carriers of information and such important factors in the transaction of interstate commerce as to bring them within the protection of the Federal Government and subject them to its regulation and control (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1, 9). So important are the public functions which they perform, that an act of Congress, passed on July 24, 1866 (Revised Statutes, § 5263), gave to telegraph companies, who accepted the provisions of the act, in broad terms, the right to construct and maintain their lines 'over any portion of the public domain of the United States * * * and along any of the military or post-roads of the United States which (had) been or (might thereafter) be declared such by law,' provided they were so constructed as not to interfere with travel on such military or post-roads. A subsequent act of Congress (Revised Statutes, § 3964) declared all railroads then or thereafter in operation to be *post-roads*; and while the construction placed on the former act has been that it does not give to a foreign telegraph company, in any State, the right to enter upon private property and set its poles without the owner's consent

(*Pensacola Telegraph Co. v. Western Union Telegraph Co., supra ; Western Union Telegraph Co. v. Ann Arbor Railroad Co.*, 178 U. S., 239, 243), yet, if a telegraph company erects its poles on a railroad right of way with the consent of the owner, as in the present instance, and its poles and wires in no wise interfere with travel or the operation of the railroad, no reason is perceived why a court of equity should compel it to remove its lines from the right of way if the telegraph company is willing to pay a reasonable compensation for its use, especially where it appears that no express agreement was made that they should be removed, when the lines were erected.

"Furthermore, the statutes of the State of North Dakota (Revised Code of North Dakota, 1899, § 5956) expressly confer upon telegraph companies the right to exercise the power of eminent domain for the location of their lines, and we presume that similar statutes have been adopted in some if not all of the States where other portions of the lines in controversy are located. This power, of course, cannot be exercised *for the condemnation of rights of way over property already devoted to a public use if the new use would materially interfere with the old ; but it is not apparent that the existence of a telegraph line on a railroad right of way, where such lines are usually erected, would materially interfere with the operation of any railroad, and in the present instance it is conceded that there would be no such interference.*

"It has been held, and the proposition seems to be well established by authority, that where a corporation which has the right to acquire property by an exercise of the power of eminent domain, has taken possession of property and has erected or is engaged in the erection of structures thereon but has not complied with some condition precedent necessary to render its acts in all respects lawful (such, for instance, as a failure on its part to pay some person the damages necessarily incident to the maintenance of the structure) and such person appeals to a court of equity for an injunction to restrain the maintenance or to compel the removal of the structure, the court to which such appeal is made has the power to determine the amount of the unpaid damages and to withhold an injunction and direct that the structure be permitted to remain and be operated provided the assessed damages are paid. Courts of equity will, as it seems, the more

readily pursue such a course when important public interests are at stake and a contrary course would be productive of much public inconvenience and annoyance, *City of New York and Bird S. Coler, Comptroller, v. Pine et al.*, 185 U. S., 93; *Pappenheim v. Metropolitan Elevated Railroad Co.*, 128 N. Y., 436, 444; *Shepard v. Manhattan Railway Co. et al.*, 117 N. Y., 442, 448 and cases there cited; see, also, *Osborn v. Mo. Pac. Ry. Co.*, 147 U. S., 248, 259; *Joy v. St. Louis*, 138 U. S., 1; *McElroy v. Kansas City*, 21 Fed. Rep., 257.

We think, therefore, that the decree should contain a provision authorizing the Western Union Company, if it fails to come to an agreement with the Railway Company, and the latter company shall insist upon a removal of the lines, to apply to the court at the expiration of the aforesaid stay of proceedings, for the appointment of a master and two commissioners to assess such reasonable compensation as they think ought to be paid by the Western Union Company for the privilege of maintaining the lines of telegraph erected since July 1, 1882, where they now are and the compensation to be paid for the distribution of material when the lines are built."

The foregoing cases show that the Pensacola case and the Ann Arbor case, indicate the absence of a power to appropriate *private property* generally under the provisions of the Act of July 24, 1866, yet in a number of other cases this Court and other Courts have so construed the act as necessarily to involve all the elements of a grant of power to appropriate the classes of property named in the Act, to wit, Public Domain, Land under Navigable Waters, and along and upon Post Roads. These conclusions will be found to necessarily follow from a consideration of the general policy of the Act, and the language employed, construed in the light of the contemporary circumstances, and history.

General Considerations Concerning Act of July 24, 1866.

But let us look now at the Act of July 24, 1866, and see if we can ascertain from any of the legitimate aids to the construction of that act, whether Congress really did intend the act to be interpreted as the railroad companies seek to interpret it, or whether it was intended that it should have the effect and meaning that is contended for by the telegraph company.

The first suggestion with respect to the act and its meaning as construed by the railroad companies is that with such construction it practically becomes meaningless, that such construction emasculates the Act and deprives it of all force and effect. The natural inference from the language of the act, that any telegraph company now organized or which may hereafter be organized under the laws of any state, shall have the *right* to construct, maintain, and operate lines of telegraph over and along any of the military or post-roads of the United States, &c., is that Congress intended to confer some privilege or power which such telegraph company would not possess in the absence of the act. Yet the construction contended for by the railroad companies gives it no such power whatever, because if the telegraph company is not given the means to enforce the "*right*" to construct, maintain, and operate telegraph lines over and along the post-roads of the United States, the Act amounts to but a mere permission by Congress to the telegraph company thus to construct, maintain and operate, provided the consent of the State, and the consent of the owner of the post-road (the railway com-

pany) is obtained. That is not a "*right*" to construct; it is a mere permission to construct, conditioned upon the consent of other parties, a permission which it required no act of Congress to make effective.

Again, if the construction contended for by the railroad companies is adopted that, as to post-roads, the telegraph company may construct, maintain and operate, if it makes an arrangement with the railroad company owning the post-road, and under the act there is no means of compelling the railroad company to enter into any arrangement—no legal method of requiring an arrangement, in lieu of the railroad company's consent thereto—then the "*right*" to construct, maintain and operate, is not granted by the Act, but is dependent upon the personal will or whim of the railroad company. The same may be said respecting the consent of the State as the owner of the post-road, where it is a highway, or a turnpike. Evidently that was not what was in the contemplation of Congress in passing this act, and evidently this Court did not consider that to be the meaning of the act, because in the Pensacola case, the St. Louis cases, and in the Union Pacific case, cited *ante*, the clearest affirmation is made of the proposition that neither the State, the city, nor the railway company, as the owner of the post-road, can arbitrarily refuse permission to the telegraph company to go along and upon the post-road. In the St. Louis case, the Court held that the city, as the owner of the streets, cannot arbitrarily determine the amount of the compensation for their use by the telegraph company, but the court is an arbiter to which the telegraph company may appeal to determine whether the claim of the city as owner of the post-road for compensation is reasonable and just. This is precisely

what is done in the case of condemnation, which is often described by the courts as a forced sale, the Court coming in to fix and determine the just terms upon which the title shall be transferred from the owner to the public agent making the purchase.

We have then the remarkable anomaly presented under the construction of this Act of July 24, 1866, contended for by the defendant railroad companies in this case; that the railroad company cannot, by express contract, bind itself to keep the telegraph company off of its right of way—such a contract being absolutely void, as decided by Mr. Justice HARLAN (160 U. S.), because against the declared policy of that act, which was declared to be:

> "The object of that act was not only to promote and secure the interests of the Government, but to obtain for the benefit of the people of the entire county every advantage in the matter of communication by telegraph which might come from competition between corporations of different states,"

but that it may arbitrarily defeat this act and its declared policy by arbitrarily refusing to take any action. The Court will not construe this act in such a way as to involve such contradictions and absurdities.

It is further to be observed that to apply the decision in the St. Louis cases to streets and highways, and deny its applications to railways, is to introduce a classification of Post Roads not justified by any language in the Act of July 24, 1866, or in the nature of the case. All Post Roads are equally subject to the control of Congress. Congress had by repeated enactments, prior to the passage of the Act of July 24, 1866, made all railroads Post Roads. The

language of the Act of July 24, 1866, so far from indicating any intention to differentiate the Post Roads or to classify them, indicates an intent uniformly to subject all Post Roads in the United States to the operation of the act. No reason is apparent in the subject matter of the legislation why it should be made to apply to streets and highways to the extent decided in the St. Louis case, and its application to railways be denied. The language is very comprehensive. It is "over and along *any* of the military or post roads of the United States, which have been, or may hereafter be declared such by Act of Congress." No more definite words could have been employed to express the intent of Congress that the act should apply to *all* post roads everywhere of whatever kind, and by whomsoever owned and controlled. Under the Act of Congress, cited *ante* (p.), the language of the first section of the act is as definite as though it had used the terms "all railroads."

In the brief of the Railroad Companies in the Court below it is said, respecting the St. Louis case:

"In that case, however, the Supreme Court was dealing, not with property devoted to a public use owned by a private corporation, but with public property devoted to a public use—in other words, with a public highway owned and controlled by the public. All that was said by Mr. Justice BREWER is to be read in connection with that fact. Whilst Congress never intended, as was held in the two cases from which we have quoted so fully, to take railroad property out of the possession of its owners, it did intend to permit the use of a public highway owned by the public for the location thereon of a line of telegraph wires. * * * It may very well be that the Federal Government may insist upon the occupation of public streets; but this proposition is entirely different from the one which was negatived by the Supreme Court in the Pensacola and Ann Arbor Cases" (Brief, p. 40).

No such distinction between classes of highways, we insist, is justified by any language in the Act of July 24, 1866. The only basis for the statement that Congress intended to permit the use of public highways owned by the public for location thereon of telegraph wires and poles is the language in the first section of the Act granting the right to any telegraph company to locate, construct and maintain its lines of telegraph over and along the military and post-roads of the United States.

If, from this language the fair intent of Congress is evidenced to permit the use of public highways, owned by the public, which are post-roads for the location of lines of telegraph wires and poles, it is impossible in the absence of any expression of intention to discriminate in the Act itself, to find a foundation for the discrimination which is insisted upon by the defendant railroad companies in favor of railroads which are "highways," and which, by repeated acts of Congress long prior to the enactment of this Act, had been declared to be post-roads. Observe, also, that all highways alike are classified under the term "post-roads," and the concession in the brief above quoted is practically a concession of the meaning of the Act contended for by the telegraph company.

On the other hand, the construction of this act contended for by the telegraph company makes it consistent with itself and with the language employed in the body of the act; with the avowed purpose of Congress in passing the act as expressed in the title; with all the discussions which accompanied its passage;

also with the course of legislation prior to its passage all of which may also be looked to as explanatory of the real meaning of the act.

The title of the act expresses a clear purpose—viz.,

"An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes."

In the brief of the Pennsylvania Railroad Company in the Court below (p. 28), it is claimed that such aid could be afforded to the Telegraph Company

"(1) by giving the consent of the government to construct lines through its public domain, and over and along its military and post roads, and across the navigable streams and waters of the United States,"

apparently without considering the curious anomaly that, in 1866, and still more markedly since that time, the parts of the country where anything would be granted to the telegraph company under that construction of the act, would be the parts where, for postal, as well as for military purposes, telegraph lines would be very rarely constructed, and but little needed; that is to say, in the great bulk of the territory of the United States where the need for intercommunication, free and unobstructed, for the public and the government, was the greatest, the act would practically have no effect, and where it did have any application, there would be very little need for the lines for postal purposes, some for military, possibly, but not sufficient to justify the broad title given to the act.

This contention, however, that the act is limited to the military and post roads of the United States upon the public domain was one of the litigated questions in Pensacola Telegraph Co. vs. Western Union Tele-

graph Co., and was fully disposed of by Chief-Justice WAITE. He says:

"It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is 'Through and over any portion of the public domain of the United States, over and along any of the military and post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation."

Observe that long prior to the passage of this Act of Congress, 1866, repeated acts of Congress had made all railways post roads, and the mails for many years had been continuously carried over them.

It is further to be noted that, under the construction contended for by the railroad companies, as applied to the telegraph lines in existence at the time the act was passed, a very small portion of them could be expected to be constructed upon the public domain of the United States, or upon military and post-roads belonging to the United States. Yet, it was evidently the expectation of Congress that telegraph companies controlling the telegraph lines then in existence would accept the privileges of the act, for in the third section of the act there was the stipulation for the benefit of the Government that it should have at any time within five years from the date of the passage of the act, the right to purchase from the telegraph com-

panies, accepting its provisions, all their lines, property and effects, at an appraised value. Evidently, it was not intended that there should be a distinction as to the right of the United States, upon the purchase, to maintain and operate these lines; that the right should be absolute as to those upon its own property, and that its right thereafter to maintain and operate telegraph lines along the post-roads of the United States not upon the public domain, where the bulk of these telegraph lines were then located and constructed, should be dependent under this act, upon any sort of arrangement which the railway companies of the country should see fit to compel the Government to make with them. This would impute to Congress the absurd intention of bargaining for the right to acquire properties the right to continue to maintain and operate which depended upon the consent of the railway companies of the United States. Evidently, the belief of Congress in passing this act was that the act effected a complete arrangement on its part, first, to aid in the construction, maintenance and operation of all of the telegraph lines of any company accepting the provisions of the act everywhere within the limits of the United States, upon Post Roads, over Public Domain and under Navigable waters, and, second, to secure to the Government, the use of the same for postal, military and other purposes, if it saw fit to act upon the option secured to it by the Act.

Legislative History of Act of July 24, 1866.

This construction of the act is enforced not only by the title and language employed, but also by a brief

reference to the debates leading up to the enactment of this Act of July 24, 1866, and its legislative history. *The bill* originated in the Senate at the first session of the 39th Congress. At that session the question of the expediency of establishing a Government postal telegraph was brought before Congress, by a resolution of the Senate, offered by Mr. Gratz Brown, of Missouri, directing the Committee on Post-Offices and Post-Roads to inquire into the expediency of authorizing the Post-Office Department to construct and operate telegraph lines along the principal mail routes, and, in connection with the postal business, to establish offices at such points as might be determined upon, open at all hours to the public and press, for the safe and speedy transmission of despatches, under proper regulations and at fixed minimum rates.

The Senate Committee upon Post-Offices and Post-Roads thereupon reported a resolution, which was passed February 23, 1866, requesting the Postmaster-General to lay before the Senate information in regard to the expediency of establishing, in connection with the Post-Office Department, "telegraph lines along the principal mail routes by the Government, to be open to the public at minimum rates of charge" (Cong. Globe, part 2, 1st Sess., 39th Cong., p. 979).

Before the report called for by this resolution was laid before the Senate, a bill, which finally became the present Act of July 24, 1866, was introduced by Senator Sherman, of Ohio, to incorporate the National Telegraph Company, with power to construct and operate lines over and along any of the post-roads of the United States. In view of the great importance of this measure, the purpose of which, as Mr.

Sherman said, was to organize a company immediately to commence the construction of telegraph lines in the United States on the postal routes, he moved the reference of the bill to a select committee of five Senators, to be appointed by the chair. This motion being agreed to, the chair appointed Mr. Sherman (chairman), Mr. Clark, Mr. Harris, Mr. Brown and Mr. Nesmith members of the committee.

A few days afterwards, the report of the Postmaster-General, on the subject of a postal telegraph, was laid before the Senate, and it was referred on the fourth of June to this select committee. This report proved unfavorable to the expediency of connecting the telegraph with the postal service in the manner mentioned in the resolution of the Senate of February 23.

On the 7th of June, Mr. Sherman, from the select committee on the bill to incorporate the National Telegraph Company, reported a bill "*to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes*," which proposed to authorize the National Telegraph Company to exercise the rights and privileges mentioned in the present Act of 1866.

On the 27th of June the Senate resumed the consideration of the bill, when Mr. Grimes, of Iowa, for the purpose of making a general law on the subject of telegraphs, moved an amendment to the bill by which the words confining the benefits of the act to the National Telegraph Company were stricken out, and the franchises, intended to be granted to that company, were conferred upon "*any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union.*"

The amendment was agreed to and the bill as

amended, after full discussion, passed the Senate. On July 11th, it was reported to the House by the Committee on Post-Offices and Post-Roads and passed that body. The bill was supported and opposed in Congress, in the view that the avowed intention and effect of the measure were to make the erection of telegraph lines *on all the post-roads of the United States, free to all corporations accepting the restrictions and obligations imposed by that Act.*

It is noteworthy that this view of the act is announced by Justice HARLAN in United States vs. Union Pacific Ry. Co. cited *ante*, in the following language:

"The object of that act was not only to promote and secure the interests of the Government, but to obtain for the benefit of the people of the entire country every advantage in the matter of communication by telegraph which might come from competition between corporations of different States."

In the brief filed by the Pennsylvania Railroad Company in the Court below (p. 28), the suggestion is made that little importance is to be attached either to the *title of the act*, or to the proceedings in Congress relating to the bill in order to determine its meaning. This Court, however, has taken a different view of a matter of this sort where the meaning of the act is uncertain or doubtful. In the case of Holy Trinity Church vs. U. S. (143 U. S., 457), Mr. Justice BREWER thus comments upon the effect of the language used in the title of an act and the discussions attending the passage of an act:

"Among other things which may be considered in determining the intent of the legislature, is the title of the act. We do not mean that it may be used to add to or take from the body of the statute (Haddon v. Collector, 5 Wall., 107) but it may help to interpret its meaning." In the case of the United States

vs. Fisher, 2 Cranch, 358, 386, Chief-Justice MARSHALL said: "On the influence which the title ought to have on considering enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

And in the case of United States vs. Palmer (3 Wheat., 610, 631), the same Judge applied the doctrine in this way: "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the State, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas? The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, 'An act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."

* * * * * *

"It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of Congress with respect to the act was gathered partially, at least, from its title. Now, the title of this act is "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any

class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors.

"Again another guide to the meaning of a statute is found in the evil which it is designed to remedy and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States v. Union Pacific Railroad*, 91 U. S., 72, 99.

* * * * * *

"It appears also from the petitions and in the testimony presented before the committee of Congress, that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act."

Then after quoting from the report of the Senate Committee recommending the passage of the bill under consideration, in which occurs an explanation of the meaning of the terms "labor" and "service" in the body of the bill, and in which the committees expressed the belief that the bill in the form in which it was finally passed would be construed as including only persons whose labor or service was manual in character, and also referring to the report of the committee of the House, explaining the purpose of the passage of the bill which was to reach only a particular class of immigrants, Judge BREWER concludes thus:

"We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this unskilled, cheap labor."

It is to be noted further that Mr. Justice BREWER starts upon the consideration of the meaning of the language of the act by the statement that the act of Trinity Church in importing its rector, Rev. E. Walpole Warren, was within the letter of the section of the act under consideration. He says:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind"; and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section."

Notwithstanding all this, such force and effect was given by this Court to the title of the act, the debates, reports of committee, and general contemporaneous events that this general language of the first section of the act was limited in its application, contrary to its natural and ordinary meaning.

The same aids to construction were resorted to in the case of Coosaw Mining Co. vs. South Carolina

(144 U. S., 559). Also in the case of Price vs. Forrest (173 U. S., 410), in which HARLAN, J., in the opinion, at page 427, thus states the rule:

"Now it is said that the grounds upon which, in Emerson vs. Hall, the claim of the heirs was sustained, exist in the present case; that Price did not act under any law, nor in virtue of any authority, and that his acts imposed no obligation in law or equity upon the Government that could have been enforced, even if suit could have been maintained against it. And the conclusion sought to be drawn is that Congress must have intended by the act of 1891, as it was held to have intended by the act in *Emerson's case* to legislate for the benefit of the heirs or next of kin of the decedent and not for his personal representatives. But there were other facts in the *Emerson case* which placed that case upon peculiar grounds. Emerson and Lorrain were both dead when the act of March 3, 1831, was passed, and therefore Congress must have had in mind the question whether the Emerson and Lorrain portions of the money on deposit in court should be given to their respective heirs or not. And the question was solved as indicated by the preamble of that act. The preamble distinctly says that Congress had in view the *heirs*, and not those who would administer the estate, of the two persons whose meritorious services were recognized. Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions. (United States vs. Fisher, 2 Cranch, 358, 386; United States vs. Palmer, 3 Wheat, 610, 631; Beard vs. Rowan, 9 Pet., 301, 317; Holy Trinity Church vs. United States, 143 U. S., 457, 462; Coosaw Mining Co. vs. South Carolina, 144 U. S., 550). In Emerson's case, the decision was placed partly on the ground that the title of the act of 1831 indicated that Congress, in using the words "legal representatives" in the body of the act, had in mind

the heirs of Emerson and Lorrain, and not technically their "personal representatives."

See
" Emerson vs. Hall, 13 Pet., 409, 413.
" Wilson vs. Spaulding, 19 Fed. Rep., 304.
" Hahn vs. Salmon, 20 Fed. Rep., 801.

While to ascertain the meaning of an act, the mere discussion in Congress is not given special weight in some of the decisions of this Court, yet reference is frequently made to reports of committees for the purpose of confirming the construction adopted by the Court.

Hepburn vs. Griswold, 8 Wall., 610.
Untermeyer vs. Freund, 50 Fed. Rep., 80.
Northern Pac. Ry. Co. vs. U. S., 36 Fed. Rep., 285.
U. S. vs. Union Pac. R. R. Co., 37 Fed. Rep., 554.

In Austin vs. U. S. (25 Court of Claims, 454), the Court said :

" It seems to us, in view of all the authorities, that a report of a committee of either House of Congress, unanimous in its character, submitting an accompanying amendment to the bill, may be considered by the Court in construing such amendment, in case of doubtful interpretation."

So, likewise, the actual proceedings of Congress may be looked to, and were considered in the case of the U. S. vs. Burr, 159 U. S., 85, as practically determining whether the statute under consideration in that Case had a retrospective action, or a prospective effect only.

Nature of "Right" Granted in Section 1, Act of July 24, 1866.

Looking, therefore, to all these aids, it is evident that it was the intention of Congress, as expressed in the title of the act, to grant something to any telegraph company which should accept the provisions of the act, in return for the benefits which the United States contracted in the subsequent sections of the act it should receive. In the first section of the act, where it expressly provides that

> "Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph over and along any of the military or post-roads of the United States,"

evidently Congress intended to confer something which the telegraph company, accepting the provisions of the act, prior to acceptance, did not have; and the question in this case is, What was thus granted?

If, in the case of a highway, which is a post-road of the United States by Act of Congress, the right to construct, maintain and operate telegraph lines thereon is dependent upon the will of the State or the city, as the owner of the highway, and the telegraph company can constract only after receiving the consent of such owner or custodian, then Congress has granted nothing, because the act means simply the permission to the telegraph company to construct its lines, if it acquires the permission of the owner of the post-road. Having the permission of the owner, the telegraph company would not need the permission of Congress, and, therefore, the act upon

this construction confers nothing upon the telegraph company.

On the other hand, if in the case of the post-road—a line of railway—the telegraph company can construct, operate and maintain a line of telegraph only upon the consent of the railway company, owner of such post-road, first obtained, and upon such terms as such railway company sees fit to grant, then nothing is granted to the telegraph company by the Act of Congress, because, having the consent of the railway company to build along its lines, and being an agency of interstate commerce, as held by the Supreme Court, (Paul vs. Virginia, 8 Wall., 168; Telegraph Co. vs. Telegraph Co., 96 U. S., 1; Telegraph Co. vs. Texas), it would not need an Act of Congress to enable it to construct, maintain and operate its telegraph lines even in a State foreign to its creation and organization; a construction which would make the pretended grant in the first Section of the act of Congress meaningless.

We are, therefore, driven to the position that, either this act is a mere naked permission to the telegraph company accepting its provisions to do certain things which it could do without such permission, provided it gets the authority or consent of other parties thus to act, or that Congress intended to grant to it the power to do something by the act, as against the State or municipality, as the owner of the public highways, or as against the railway company, as the owner of other forms of highways, which, without such Act of Congress, the telegraph company could not do. If the latter, we submit that, although Congress has not added a method of determining the amount of compensation which should be accorded to the owner of the highway in any particular case, whether a railway

company, or a State or a city; yet, as decided in the St. Louis Case, and the other cases above cited (*ante*, pp.), it is not for the owner of the highway alone to determine the amount of such compensation, but the Courts are open to determine the reasonableness of the amounts claimed and to determine the amount to be paid in any given case.

There is another phase of this question which we suggest for consideration, although it is not necessary that the Court should go to the extent to which the position about to be stated would lead us, in order to sustain the right which the Western Union insists upon in this case. The bill in this case shows, and it is uncontradicted and uncontradictable, that the railways over and along which it is desired to acquire the right to continue to maintain and operate telegraph lines, by the statutes of their creation, are public highways. It is very clear that the railway companies, in taking the land originally authorized by the State to be taken, and in all subsequent acquisitions of land for the purpose of these railways thus made public highways, were public agents, and the land was taken by the Government, and in the eye of the law as completely subjected to public uses, as though it had been taken by the State itself. The railway companies, as such, could acquire no land in connection with the operation of their railways, which was not thus subjected to the public uses and purposes, as much so as though it were taken for a turnpike or highway. The difference between a railway and an ordinary highway is not a legal difference, but is a difference of the kind of use to which the highway is subjected; in the one case

wheel vehicles drawn by horses; in the other to steam vehicles drawn by locomotives along and upon iron rails. Each is equally open to the public; in the one case without toll, because the State, by taxation, has raised the money from the citizens for the payment of the expenses of the highway; in the other cases the State has delegated to an agent the privilege of constructing the highway, and the franchise of collecting tolls from the public to use the highway; but the public in each case, subject to the varying conditions, are all alike equally entitled to use the highway. This being so, each of these species of highways, in its relations to the Congress, under the provisions of the Constitution of the United States, authorizing Congress to regulate commerce between the States and with foreign nations, and also giving it control over post offices and post roads, is equally subject to Congressional control, and Congress, as to each, possesses the same power of regulation (*In re* Debs, 158 U. S., 564).

The charters under which the constituent companies were organized, and which measure the conditions under which those companies acquired the right of way which they now occupy, expressly create these railways as "public highways." In the act to incorporate the New Jersey Railroad and Transportation Company, passed March 7, 1832, the Legislature of New Jersey, in Section 6, granted to the president and directors of said corporation all the rights and powers necessary to the survey, laying out, constructing and repair of a railroad, and provided that if they were unable for such purpose to acquire the land of the owner or owners at a price to be mutually agreed upon between them, then they might appoint three disinterested commissioners to appraise the value of the lands

which would be required by them for the construction of the railroad, with the provision in said section—

" that in case the said company, after the same is completed, shall abandon said road, or any part thereof, or cease to use and keep the same, or any part thereof, in repair, for three successive years, that then, and in that case, this charter shall be annulled and the title to the lands over which the said road shall pass, shall be revested in the person or persons from whom the lands were taken by concession or by inquisition, as aforesaid, their heirs or assigns; *And provided further*, if the state of New Jersey shall take possession of said road, then the said road and the title to the said lands shall be, and hereby is, vested in the state of New Jersey, so long as they shall maintain the same."

The public character of the corporation and its relation to the public as a highway is brought out still more clearly in Section 8, as follows:

" SEC. 8. *And be it enacted*, That the said president and directors shall have power to charge and demand tolls and rates for the passage of all carriages upon the said railroad or roads, and to fix, make, and at pleasure, change and alter such tolls and rates, and also to make regulations and rules for the collection and levying of the same, and to regulate the time and manner of transporting goods and passengers, and manner of collecting tolls on the said railroad, and also the description and formation of carriages that shall or may be used on said railroad, and all necessary machines, engines, wagons, carriages or vehicles: *Provided*, that the said corporation shall cause the rates of tolls charged to be inscribed or painted in some conspicuous place at each gate where toll shall be required to be paid: *Provided also*, that the tolls so charged, shall at no time, exceed the following rates, viz.: for an empty carriage with its appendages, weighing less than one ton, two cents per mile; above one and under two tons, four cents per mile; above three tons or more, eight cents per mile; and the following additional tolls for passengers and freight, viz.: in the carriages as charged as aforesaid, for every species of property, six cents per ton per mile, and three cents per mile for each and every passenger

carried on said railway, in said carriages; *And provided also*, that no farmer belonging to this state, shall be required to pay any toll for the transportation of the produce of his farm to market over the said road or roads, in his own carriage, weighing not more than one ton, when the weight of such produce shall not exceed one thousand pounds, but the said farmer may be charged toll as for an empty carriage: *Provided, also*, that it shall be lawful for the said company to erect and build a branch railroad from their present route, or railroads, to any landing on or near the Passaic River, not north of Bellville, or to any point or points within the township of Newark, as may be deemed expedient, and to charge tolls thereon, in the same manner, and at the same rate, as this corporation is authorized to charge."

One may look in vain through this charter or the other charters for any suggestion of any right or power in the corporation thus created to acquire or hold any land except for the purposes enumerated in the act for which the corporation was incorporated and subject to the obligations named in the act with respect to the uses of such property. In no respect is the right of private ownership of property recognized in the charters of the constituent companies from which the defendant companies derive their right to acquire and hold property and by which they have acquired and now hold the property through the State of New Jersey. They hold this property and have acquired it not in any private capacity, and have no private ownership thereof, but as public agents, and the lands which they have thus acquired are all equally and alike subject to the obligations to the public as defined by these charters, and subject to the power of Congress in any matter consistent with the general purpose for which these lands were taken.

In Civil Rights Cases, 109 U. S., 3, in the dissenting opinion, Mr. Justice HARLAN thus clearly outlines the

effect of the decisions as to the relation of a railway corporation to the public (p. 37):

"FIRST, as to public conveyances on land and water. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How., 344, this court, speaking by Mr. Justice NELSON, said that a common carrier is 'in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the consent of the parties concerned.' To the same effect is *Munn v. Illinois*, 94 U. S., 113. In *Olcott v. Supervisors*, 16 Wall., 678, it was ruled that railroads are public highways, established by authority of the State for the public use; that they are none the less public highways, because controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public; that no matter who is the agent or what is the agency, the function performed is *that of the State;* that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that, upon these grounds alone, have the courts sustained the investiture of railroad corporations with the State's rights of eminent domain, or the right of municipal corporations, under legislative authority, to assess, levy, and collect taxes to aid in the construction of railroads. So in *Township of Queensbury v. Culver*, 19 Wall., 83, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. Again, in *Township of Pine Grove v. Talcott*, 19 Wall., 666: 'Though the corporation [railroad] was private, its work was public, as much so as if it were to be constructed by the State.' To the like effect are numerous adjudications in this and the State courts with which the profession is familiar. The Supreme Judicial Court of Massachusetts, *Inhabitants of Worcester v. The Western R. R. Corporation*, 4 Met., 564, said in reference to a railroad:

"'The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. * * * It is true that the

real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public.'" In *Erie, Etc., R. R. Co. vs. Casey*, 26 Penn. St., 287, the court referring to an act repealing the charter of a railroad, and under which the State took possession of the road, said:

"'It is a public highway, solemnly devoted to public use. When the lands were taken, it was for such use, or they could not have been taken at all. * * * Railroads established upon land taken by the right of eminent domain by authority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them.'

"In many courts it has been held that because of the public interest in such a corporation the land of a railroad cannot be levied on and sold under execution by a creditor. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit."

In Wisconsin, &c., R. R. Co. vs. Jacobson, 179 U. S., 287, Justice PECKHAM, at page 296, says:

"Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner and the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. Olcott v. Supervisors, 16 Wall., 678, 694; Cherokee Nation v. Southern Kansas Railway Company, 135 U. S., 641; United States v. Joint Traffic Association, 171 *Id.* 505-569, 570; Lake Shore Railway Company v. Ohio, 173 *Id.*, 285, 301.

"It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given

them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid. *Olcott* v. *Supervisors*, *supra*. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to supervise primarily the public good and convenience."

In Lake Superior & Mississippi R. R. Co. vs. U. S., 93 U. S., 442, Mr. Justice BRADLEY very carefully analyzed and considered the status of railways and especial attention is invited to the learned opinion in which he sets forth with some detail the legislative history of the earlier railway companies, concluding as follows:

"Be this, however, as it may, the general course of legislation referred to sufficiently demonstrates the fact, that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name. This view pervaded the language of most charters granted at that period, many of which still remain in force; and the railroads constructed under them are, theoretically, at least, public highways to this day. This fact affords the only explanation of much of the language used, not only in those early charters, but in many of those which have been granted since, the latter adopting, as was natural, the forms of phraseology found prepared to hand. The language referred to is only consistent with the idea that railroads were to be regarded and used as public highways. The forms of legislative expression thus adopted, and coming down from a period when they had greater practical significance than they now have, bring with them an established sense, which renders them free from all uncertainty and doubt. We know, as well as we know the sense of any phrase in the English language which has historical meaning and application, what is meant when a railroad is spoken of in a law as a 'public highway.' We know that it refers to the immovable structure stretching across the

country, graded and railed for the use of the locomotive and its train of cars." * * *

"In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles."

Among the charters to which Mr. Justice BRADLEY refers in the opinion referred to is the charter of the Camden & Amboy R. R. Co., the charter of the New Jersey Railroad Company, and the charter of the Philadelphia & Trenton R. R. Co., referred to and set forth in the bill in this case.

That the railroad of the Pennsylvania Railroad Company is a public highway, within the meaning of the Act of Congress of July 24, 1866, authorizing telegraph companies to construct, maintain, and operate lines of telegraph over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress, is susceptible of demonstration, and, has been, in fact, so decided by the Supreme Court of the State of Pennsylvania.

The Pennsylvania Railroad Company was chartered on the 13th day of April, 1846 (Pamphlet Laws of Pennsylvania, 1846, p. 312). Section 21 of the charter being as follows:

SECTION 21. That upon the completion of said railroad, or any part thereof, the same shall be esteemed a public highway, for the conveyance of passengers and the transportation of freight, subject to such rules and regulations in relation to the same, and to the size and construction of wheels, cars, and carriages, the weight of loads, and all other matters and things connected with the use of said railroad, as the president and directors may prescribe and direct:

Provided, that the said company shall have the exclusive control of the motive power, and may from time to time establish, demand, and receive, such rates of toll or other compensation, for the use of the said road, and of said motive power, and for the conveyance of passengers, the transportation of merchandize and commodities, and the cars or other vehicles containing the same, or otherwise, passing over or on said road, as to the president and directors shall seem reasonable; *Provided, however, nevertheless*, That said rates of toll and motive-power charges, so to be established, demanded or received, when the cars used for such conveyance or transportation are owned or furnished by others, shall not exceed two and a half cents per mile for each passenger; three cents per mile for each ton of two thousand pounds for freight; three cents per mile for each passenger or baggage car, and two cents per mile for each burden or freight car, every four wheels being computed a car; and in the transportation of passengers no charge shall be made to exceed three cents per mile for through passengers, and three and a half cents per mile for way passengers."

The Supreme Court of Pennsylvania, in the case of Trunick vs. Smith (63 Pa. St. Reps., p. 18, 1869), referring to the aforesaid charter of the Pennsylvania Railroad Company, says (p. 22):

"Under the charter of the Pennsylvania Railroad Company, Pamphlet Laws of 1846, page 323, the railroad is made a public highway, which may be used by persons owning their cars, the company furnishing the motive power."

People's Telephone Company vs. President, &c., of Berks and D. Turnpike Road, 49 Atlantic Reporter (199 Pa. St., 411, 1901), decided that a telephone company incorporated under the General Corporation Act of April 29, 1874, and its supplements, is a telegraph company, and a turnpike is a highway, within the meaning of that act, providing that a telegraph company incorporated thereunder may construct its lines

along any highway. In that case the Court, after stating that the telephone company was duly incorporated and was proceeding to construct its line of telephone through the City and County of Lebanon, thus states the facts of the case:

"The defendant company is a corporation duly incorporated under and by virtue of the act of general assembly of the commonwealth of Pennsylvania, approved March 2, 1805, and its several supplements, for the purpose of making an artificial road from the River Schuylkill at Reading, in the County of Berks, to or near Hummelstown, in the county of Dauphin, which it located and constructed, and since its completion maintains and operates as a public highway, and which traverses the said city and county of Lebanon. The plaintiff company has located a line, connecting with their constructed line in the said city of Lebanon, from a point in the township of North Lebanon, near the corner of Front street, in the said city of Lebanon, and the Berks & Dauphin Turnpike Road, to the village of Avon, in said township, close to the fence on the north side of said turnpike road, but not on the traveled part, nor on the roadbed thereof, and in line with the poles of the Western Union Telegraph Company; the poles proposed to be erected by the plaintiff company to be ten feet higher than those of said telegraph company. The plaintiff company proceeded to erect its poles on the line located as above set forth. The first pole was put up at the corner of said turnpike road and the first road running north beyond the railway crossing at Avon, and other poles were distributed along said located line. On December 20, 1899, the defendant company cut down and removed the said pole erected by the plaintiff, and also removed a number of other poles which the plaintiff intended to use in the construction of its located line; and the defendant company has expressed its determination and intention to resist the erection of any poles along the line of said turnpike road located as aforesaid, and has threatened to cut down and remove any poles which the plaintiff may erect, and which are necessary for the purpose of operating said telephone line. The erection and construction of the said telephone line on the line as located on the north side of said turnpike road by

the plaintiff company will not incommode the public use and travel on the said turnpike.

"The authority under which the plaintiff proposes to erect its telephone line on defendant company's turnpike road is statutory, and the statutes applicable are: The general corporation act of April 29, 1874, which in section 33 provides as follows: 'The charter for the incorporation of a company to maintain a telegraph line shall, in addition to what is hereinbefore required, also state: (1) The general route of the line of telegraph; (2) the points to be connected. Clause 1. Such incorporation shall be authorized, when incorporated as hereinbefore provided, to construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines, but the same shall not be so constructed as to incommode the public use of said roads, streets or highways, or injuriously interrupt the navigation of said waters; and this act shall not be so construed as to authorize the construction of a bridge across any of the waters of this state."

After stating that under the statutes of Pennsylvania the telephone was regarded as a species of telegraph, and that the telephone company is a telegraph company within the meaning of the legislation of Pennsylvania, the Court continues as follows:

"That the highways of the state are within the control of the legislature is well settled. The legislature has full power and jurisdiction over the highways of the state, and may consent to their use, by legislative enactment, for the purposes of telephone lines, as a means to facilitate communications in the daily transactions of business, not only between the citizens of the same community, but of citizens of one community with those of another, and thereby accommodating the public at large. The defendant company's turnpike road was located and constructed by virtue of legislative enactment and for public purposes, and as we said in Northern Cent. Ry. Co. v. Com., 90 Pa., 306: 'It differs from a common highway in the fact that it is not constructed in the first instance at the public ex-

pense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway.' A turnpike road can be constructed and opened under authority of law only. When used by the public it becomes a public highway. Pittsburgh, M. & Y. R. Co. v. Com., 104 Pa., 583. Judge RICE in McManus' Appeal, 5 Pa. Super. Ct., 65, says: 'Nothing is better established than that a turnpike road is a public highway, and every traveler has the same right to use it upon payment of toll established by law as he would have to use any other public highway.' The plaintiff company therefore is authorized under the laws of the commonwealth to locate and construct a telephone line on the public highway known as the Berks & Dauphin Turnpike Road, in the county of Lebanon, and, if located so as not to incommode the used of said public highways, the defendant company cannot be permitted to interfere with its construction and operation as threatened. What has already been done by the defendant by way of interfering with plaintiff in its construction of its telephone line can be compensated in damages, and a court of equity would not interfere; but what is threatened by the defendant to be done if the plaintiff proceeds to do what under the law it has a right to do, viz., erect and construct its telephone line as located, demands the exercise of the restraining power of the court and warrants interference by injunction. And now, February 15, 1900—the above cause coming on to be heard on January 26, 1900, on bill, answer and proofs—it is ordered, adjudged and decreed as follows: That the defendant corporation, its officers, managers, agents and employees, it, they and each of them are hereby restrained and enjoined hereafter from cutting down, overthrowing and removing any of its poles and fixtures which the plaintiff may erect to sustain the wires of its proposed line, and from interfering with the erection or maintenance by the plaintiff of said poles and fixtures along the north side of said turnpike road close to the fence, not on the traveled part nor on the roadbed thereof, nor at any place which will not incommode the public use and travel on said public highway. It is further ordered that the defendant pay the costs of this proceeding."

This was the opinion of the Court below, and the Supreme Court of Pennsylvania affirmed the judgment upon the foregoing opinion, *per curiam*, after careful consideration.

By referring to the charter of the Turnpike Co. it will be seen that the act of March 2, 1805 (Carey & Biorens Pennsylvania Laws, Vol. 7, p. 427), created a private turnpike company, giving it powers similar to those granted to the Pennsylvania Railroad Company in its charter, the only difference being the different class of property which was to be managed by the private corporation thus created. As regards the question we are considering, the essential features of the two acts are the same.

It is material to note here that this turnpike was not the conversion of an ordinary highway into a toll road, but was constructed upon lands acquired by the company for that purpose. In disposing of the case the Court held that the turnpike was a highway within the meaning of the constitution and laws of the State of Pennsylvania; and our contention is that if this artificial turnpike road was a highway, equally so are the railroads of the defendant railroad company. It is impossible to distinguish between the two cases.

On the general subject of whether telegraph lines are an additional servitude upon lands the fee of which is owned by a private person, but taken for a public highway, there is a conflict of opinion in the State courts. As to the streets of a city, it is generally held that they are not an additional servitude, even as against the private owner of the fee. In the ordinary highways, some courts hold that a telegraph line is an additional servitude as respects the owner of the fee. Others hold the reverse. So far as we know, this

point has not been settled in Pennsylvania. The decisions, pro and con, upon this subject have been collected by Mr. Edward Q. Keasbey, in a note to the case of Nichol vs. Telegraph Company, 7 Am. Electrical Cases, p. 277, which, for the convenience of the Court, we have copied below.* This case will also be found in 62 N. J. Law, p. 733.

Now, then, let us distinguish. So far as the public is concerned, no question has ever existed as to the power of the Legislature to authorize the occupation

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Note to Nicoll v. Teleph. Co., 62 N. J. L. 733, 7 Am. Electl. Cas. 283.

Are telegraph or telephone lines a new burden on the highway? There is much difference of opinion on this subject between the courts of different States. On the one side, it is argued that the easement of highway is in the last analysis for the purpose of intercommunication; not merely travel and transportation but also the transmission of intelligence, and that for this purpose the telegraph is only an improvement upon the post-horse or the mail-wagon; and on the other side it is contended that the streets were intended primarily for travel and transportation, and that the mode of transmitting intelligence by the telegraph is wholly different from the former use of the road and involves the permanent appropriation of the soil for poles, and that the landowner who dedicated his land for a road cannot be supposed to have contemplated that it should be used for this purpose without further compensation. See Keasbey on Electric Wires, secs. 89-90.

On the one side are the following cases: Gay v. Mutual Union Teleg. Co., 12 Mo. App. 485, 1 Am. Electl. Cas. 427; Forsythe v. B. & O. Teleg. Co., 12 Mo. App. 494; Pierce v. Drew, 136 Mass. 75, 1 Am. Electl. Cas. 571; Julia Building Ass'n v. Bell Teleph. Co., 88 Mo. 258, 1 Am. El. 801; St. Louis v. Bell Teleph. Co., 96 Mo. 623, 2 Am. Electl. Cas. 44; Irwin v. Great Southern Teleph Co., 37 La. Ann. 63, 1 Am. Electl. Cas. 709; Hewett v. W. U. Tel. Co., 4 Mackey (D. C.) 424, 2 Am. Elecl. Cas. 222, 2 Cent. Rep. 694; McCormick v. District of Columbia, 4 Mackey (D. C.) 396, 54 Am. Rep. 284 · Hershfield v. Rocky Mt. Bell Teleph Co., 12 Mont. 102, 4 Am. Electl. Cas. 72; People v. Eaton, 100 Mich., 208, 5 Am. Electl. Cas. 87, 24 L. R. A., 721, with note; Cater v. N. W. Exchg. Teleph. Co., 6 Minn. 539, 63 N. W. Rep. 111, 5 Am. Electl. Cas: 111; York Teleph. Co. v. Keesey, 5 Pa. Dist. Ct. R. 366, 6 Am. Electl. Cas. 107; Magee v. Overshiner, 150 Ind. 127, 49 N. E. Rep.

of highways by telegraph lines. The only question of conflict is whether as to the owner of the fee, where the owner of the adjoining land owns the fee of the highway, the erection of a telegraph line is an additional servitude. No such question is in this case, because it does not appear on this record that the defendant railroad companies own the fee of their right of way. If, therefore, the railroad of the defendant railroad companies is a highway and the railroad companies are not the owner of the fee, all the cases recognize the right

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951, 7 Am. Electl Cas. 241; Roake v. Am. Teleph. & Teleg. Co., 41 N. J. Eq. 35, 2 Am. Electl. Cas. 218 (wires without poles).

On the other side are the following cases: Dusenbury v. Mutual Teleg. Co., 1 Abb. N. C. (N. Y.) 440, 1 Am. Electl. Cas. 448; Metropolitan Teleph. & Teleg. Co. v. Colwell Lead Co., 67 How. Pr. 365, 50 N. Y. Super. Ct. 488, 1 Am. Electl. Cas. 662; Blashfield v. Empire State Teleph. & Teleg. Co., 71 Hun, 532, 24 N. Y. Supp. 1006, 4 Am. Electl. Cas. 92; Eels v. Am. Teleph. & Teleg. Co., 143 N. Y. 133, 5 Am. Electl. Cas. 92; Postal Tel. Cable Co. v. Bruen, 39 N. Y. Supp. 220, 6 Am. Electl. Cas. 120; Willis v. Erie Teleg. & Teleph. Co., 37 Minn., 347; Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 27 Am. Rep. 453, 1 Am. Electl. Cas. 565; Smith v. Cent. Dist. Pr. & Teleg. Co. 2 Ohio C. C. R. 259, 2 Am. Electl. Cas. 237; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. Rep. 365, 7 Am. Electl. Cas. .....; Am. Teleph. & Teleg. Co. v. Jones, 78 Ill. App. 372; Daily v. State of Ohio, 51 Ohio St. 348, 5 Am. Electl. Cas. 186; Pacific Postal Teleg. Co. v. Irvine, 49 Fed. Rep. 113, 4 Am. Electl. Cas. 140; Spokane v. Colby, 10 Wash. 610, 48 Pac. Rep. 248, 7 Am. Electl. Cas. .....; W. U. Teleg. Co. v. Williams, 86 Va. 896, 11 S. E. Rep. 106, 3 Am. Electl. Cas. 184; Chesapeake & Pot. Teleg. Co. v. Mackenzie, 74 Md. 36, 21 Atl. Rep. 600, 3 Am. Electl. Cas. 196; Stevens v. Postal Teleg. Cable Co., 68 Miss. 559, 9 So. Rep. 356; Theobald v. Railway Co., 66 Miss. 279, 6 So. Rep. 356; Am. Teleph. & Teleg. Co. v. Pearce, 71 Md. 535, 18 Atl. Rep. 910, 3 Am. Electl. 169 (telegraph along a railway).

The subject is discussed in Lewis Em. Dom. sec. 131; Dillon Mun. Corp. (4th ed.) secs. 698, 698*a*; Elliott on Roads and Streets, pp. 583-6; Randolph on Eminent Domain, pp. 229-235, and in the notes in 2 Am. R. R. & Corp. Rep. 258-268, 1 *id.* 73-86, 2 *id.* 56, 28 Am. St. Rep. 229-235, and Keasbey on Electric Wires, chap. VIII.

Whether or not the telegraph line is a new burden on the land,

of the proper legislative department to authorize the construction of a telegraph line without any compensation, and such construction is not regarded as the taking of any private property for which the constitutional right to compensation exists. If, in the construction of the line, any damage is done to the railroad company or to the adjoining proprietor, there is imposed a liability to pay such damage.

The Act of Congress of July 24, 1866, conferring the right upon the telegraph company to construct, main-

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the owner has a right to compensation for any substantial obstruction to his light, air or access. Keasbey on Electric Wires, sec. 105; H. Clausen & Sons Brewing Co. v. B. & O. Teleg. Co., 2 Am. Electl. Cas. 210; Zehren v. Milwaukee Elec. Ry. & Lt. Co., 99 Wis. 83, 74 N. W. Rep. 538, 7 Am. Electl. Cas. .....; Jaynes v. Omaha St. Ry. Co., 53 Neb. 631, 74 N. W. Rep. 67, 7 Am. Electl. Cas. .....; and it has been held that he is entitled to compensation for injury to trees along the roadside. Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 1 Am. Electl. Cas. 505; Dailey v. Ohio, 51 Ohio St. 348, 5 Am. Electl. Cas. 186; Clay v. Post. Tel. Co., 70 Miss. 406, 7 So. 658, 4 Am. etc. 224; McCruder v. Rochester St. Ry. Co., 28 N. Y. Supp. 13, 4 Am. Electl. Cas. 224; and, on the other hand, *it has been held that even assuming the telegraph line to be a new burden, the right of the landowner in trees in the street is subject to municipal needs with respect to a fire-alarm telegraph.* Southern Bell Teleph. Co. v. Francis, 100 Ala. 224, 6 Am. Electl. Cas. 160, 19 So. Rep. 1; Southern Bell Teleph. Co. v. Constantine, 61 Fed. Rep. 61, 4 Am. Electl. Cas. 319; and also that the telegraph company is liable for wanton or unnecessary damage. Tissot v. Great Southern Teleph. & Teleg. Co., 39 La. Ann. 996, 3 So. Rep. 261, 2 Am. Electl. Cas. 286; Gorham v. East Chester Elec. Co., 80 Hun 290, 30 N. Y. Supp. 128, 5 Am. Electl. Cas. 199; Hoyt v. Southern New England Teleph. Co., 60 Conn. 388; Poston v. Cumberland Teleg. & Teleph. Co., 94 Tenn. 696, 5 Am. Electl. Cas. 203; Postal Teleg. Co. v. Lenoir, 107 Ala. 640, 18 So. Rep. 266, 6 Am. Electl. Cas. 167, note; Postal Tel. Co. v. Brantley, 170 Ala. 683, 18 So. Rep. 321; Bradley v. So. New England Teleph. Co., 66 Conn. 559, 34 Atl. Rep. 499, 6 Am. Electl. Cas. 152; O'Connor v. Nova Scotia Teleph. Co., 22 Canada Sup. Ct. Rep. 276; Gilchriat v. Dominion Teleg. Co., Sup. Ct. New Brunswick, 3 Pugsley & Burridge, 553, affirmed Supreme Court Canada, 2 Am. Electl. Cas. 298, note.—E. Q. K.

tain and operate their telegraph lines upon the military and post-roads of the United States, wisely omitted to make any provision in regard to assessment of damages or compensation, leaving that to be determined in each particular case by the facts and the laws applicable to such particular case. If in any given case there was a taking of the property of the railway company—"taking" within the constitutional sense—then, under the Constitution, compensation would have to be made therefor. If, in the constitutional sense, there was no taking of private property by the occupation of the highway as a railroad or highway or post-road by the telegraph company, then they would have the right to occupy it without making any payment, provided that it did no damage to the primary use.

We refer to these considerations, but it will be observed that in the present case the telegraph company offered to pay, and is willing to pay any compensation that may be adjudged that the railroad companies are entitled to.

In Section 1 of the Act of Congress of July 24, 1866, Congress was therefore dealing with property all of which was within Congressional control, to wit, the public domain of the United States, the military or post-roads of the United States, and the navigable waters of the United States. The Pensacola case, held that all of each of the classes of property thus subject to Congress were brought within the scope of this act. In the mind of Congress, they are all alike in one respect, to wit, that they are all devoted to the public use, and belong to the public. As such, Congress could deal with them, and did attempt to deal with them in this act, without any classification of the

classes of public domain, or post-roads, or navigable waters.

The language employed by Mr. Chief Justice WAITE in construing the act in the Pensacola case, to the effect that

"the use of public property alone is granted, and if private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted"—

is consistent with the telegraph company's construction of this act, upon the theory that railroad property, streets, highways, the public domain and navigable streams and waters of the United States stand upon an exact equality, so far as the power of Congress is concerned, and each and all, equally and alike, subject to the provisions of this act, because *public*, and not *private*, property.

When Congress therefore, in the exercise of its sovereign power of aiding a telegraph company, an instrumentality, which is at once an agent of interstate commerce and an agent of the Government of the United States, provides that such agent may attach itself to this highway, which is under the control of the railway company, without interference with the ordinary travel thereon, what, if anything, in the way of compensation is the railway company entitled to receive?

Mr. Justice Bradley's Great Decision.

A similar question in certain respects, has been very fully and clearly discussed in the case of Stock-

ton vs. R. R. Co. (32 Fed. Rep., 9), in the able opinion by BRADLEY, Justice. In this case Stockton, the Attorney-General of New Jersey, filed a bill to enjoin the railroad company, defendant, from constructing a bridge over Arthur Kill, between Staten Island and the State of New Jersey, upon the ground that the Staten Island Rapid Transit Railroad Company, defendant, was building a bridge and occupying, *with the piers thereof, lands under the Kill, the title to which was in the State of New Jersey.* The Staten Island Rapid Transit Railroad Company, a corporation of New York, claimed the right to build the bridge in question and to occupy the lands under water necessary for the support of its piers under an Act of Congress approved June 16, 1886, the essential provisions of which were as follows :

(1) "It shall be lawful for the Staten Island Rapid Transit Railroad Company, a corporation existing under the laws of the State of New York, and the Baltimore & New York Railroad Company, a corporation existing under the laws of the State of New Jersey, or either of said companies, to build and maintain a bridge across the Staten Island Sound, or Arthur Kill, from New Jersey to Richmond County, New York, for the passage of railroad trains, engines and cars thereon, and to lay on and over said bridge, railway tracks for the more perfect connection of any railroads that are or may be constructed to the said sound on or opposite said point ; and in case of any litigation concerning any alleged obstruction to the free navigation of said sound on account of said bridge the cause may be tried before the Circuit Court of the United States of either of said States in which any portion of said obstruction or bridge touches, and other railway companies desiring the use of said bridge shall have and be entitled to equal rights and privileges in the passage over the same, and in the use of the machinery and fixtures thereof and of all the approaches thereto, for a reasonable compensation, to be paid to the owners of said bridge, under and upon such terms and conditions as shall be prescribed by the Secretary of

War upon hearing the allegations and proofs of the parties, in case they shall not agree."

Section 2 required that the bridge should be constructed as a pivot draw-bridge, and made regulations as to the length of spans, elevation above mean low water-mark, and how the draw should be operated and the nature of the signal lights to be maintained thereon.

Section 3 provided that the bridge constructed under the act should be a lawful structure and recognized and known as a post route, open for transportation of mails and troops and munitions of war, at the same rate per mile as for other transportation over roads or public highways leading to the bridge.

Section 4 provided for the submission of the plans and location of the bridge, a detailed map of the sound, exhibiting the depths and currents to be submitted to the Secretary of War, and requiring his approval to the location and plans, and also of any changes in the plans of the bridge during the progress of the work thereon, and also giving the Secretary of War power to make any changes or alterations in the bridge, so that it should not obstruct navigation, even to the extent of the removal of the whole structure.

Section 5 reserved to Congress the right to alter, amend, or repeal the act.

It will be observed that the act nowhere makes any provision in terms for the appropriation of the rights or property of the State, and makes no provision for ascertaining the compensation to be paid to the State as the proprietor of the land under the navigable waters and necessarily to be occupied in the construction of the bridge.

The company, under the authority of this act, caused the plan and location of the bridge, with a detailed

map of the sound at or near the same, as required by the act, to be submitted to the Secretary of War, who duly approved the same. The company thereupon, by its engineer and contractors, proceeded to make preparations for laying the piers and erecting the bridge according to the plan and upon the location thus approved. Thereupon the Attorney-General of New Jersey filed an information to prevent the construction of the bridge. The information proceeded upon the theory—first, that the State was the owner of the shore and the land under water of all navigable streams and arms of the sea within its borders, and had the right of supreme dominion over the same; second, that this right of supreme dominion had never been ceded or surrendered to the United States, and that without such cession or surrender the United States could not take possession of the lands, or authorize other parties to do so, except by making compensation therefor, as provided in the Fifth Amendment to the Constitution.

It was further contended that, at the place of location of the bridge the ownership of the soil on the part of the State of New Jersey extended from ordinary high water-mark to the centre line of the sound, as being the boundary line between New Jersey and New York.

It was further contended in the information that the act of Congress could not be construed as intending to give any authority to take any portion of said lands without compensation; that the act must be construed as a mere license or permission to erect a bridge so far as Congress is concerned, leaving the companies named in the act to obtain from the State the usual authority to build the bridge on the territory and lands of the

State; that if the act should be construed as giving authority to erect the bridge without the consent of the State and without compensation for the lands taken in such construction, then it violates the Constitution of the United States, not only by authorizing the lands of the State so taken without compensation, but by enlarging the powers of a corporation created by the State itself, in case the bridge should be built by the Baltimore and New York Railroad Company, the same being a corporation under the laws of the State of New Jersey, because it authorized this railroad company to do what by its State charter and other laws of the State it was expressly prohibited from doing.

It was further contended that, if the other corporation, the Staten Island Rapid Transit Company, should construct the bridge, it had no authority from the State of New Jersey to exercise any corporate franchises within that State and could not, therefore, lawfully construct the bridge, because the comity of the State of New Jersey had not been accorded to it in that respect, but, on the contrary, an act of the Legislature of New Jersey prohibited such corporation from erecting a bridge without the permission of the Legislature of New Jersey first given by statute enacted for that purpose.

The answer advanced no materially new facts, except that the Staten Island Rapid Transit Railroad Company was building this bridge as a connecting link of a line of railroad extending from the Bay of New York across the States of New York, New Jersey, Pennsylvania and other States, as an instrument of commerce among the States, and that the Baltimore and New York Railroad Company had nothing to do with the proposed building of the bridge.

The case was originally brought in the State Court, in the Court of Chancery, and a preliminary injunction was granted by the Chancellor upon the bill and affidavits. The defendant railway companies removed the case to the United States Circuit Court as a case arising under the Constitution and Laws of the United States, and in that Court filed their answer and a motion to dissolve the injunction, but after argument the parties stipulated to submit the case as upon final hearing upon bill and answer, there being no controverted facts in the case.

The late Mr. Justice BRADLEY heard the case and announced the decision of the Court therein. After stating the facts as above given, he comes to the question of the capacity of the Staten Island Rapid Transit Railroad Company in the premises and examines the matter under the following heads:

FIRST. The true construction of the act of Congress on which the case arose, whether merely permissory or a grant of power to build.

SECOND. The capacity or right of the defendant, the Staten Island Rapid Transit R. R. Co. to perform any of the acts, or transact any business as a corporation in New Jersey.

THIRD. The power of Congress to authorize a railway company, a corporation of the State, to construct roads and other means of communication between the States, without the concurrence and consent of the States in which the structures are made.

FOURTH. Whether, under the act in question, the provisions of the Fifth Amendment to the Constitution of the United States were violated by making no provisions for compensation.

After passing upon the two preliminary questions,

Mr. Justice BRADLEY comes to consider that of compensation for lands taken and the power of Congress as respects the lands of the State and deals with it as follows:

"The most strenuous objection, however, to the exercise of the power in this case and in the manner proposed, is based on the fact that the piers of the bridge are to rest, and the bridge is to stand, on land which belongs to the State, and that no compensation is proposed to be made for the taking thereof. It is contended that, if the land of the State can be taken at all (which is denied), it can at most only be taken, like other property, after just compensation has been made.

"First, it is denied that the land of the State can be taken at all without voluntary cession or the consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the State in almost every case of interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a State will not be crossed. It will also be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum*. It interposes an effectual barrier to the execution of a constitutional power vested in Congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a State is necessary, such State may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution.

"One argument for the position is that no part of the territory of one sovereign can be acquired by another except by conquest or cession; and, therefore, in a case like the present, where conquest is out of the question, it can only be acquired by cession; and this conclusion is supposed to be affirmed and provided for in our federal system by the seventeenth paragraph of section 8, art. 1, Const., which gives to congress power to exercise exclusive legislation 'over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful

buildings.' It is argued that this is the only constitutional method by which the United States Government can obtain the possession and use of lands within a state, especially of lands belonging to the state.

"The argument, however, is directed to the acquisition of territory, with exclusive jurisdiction over the same, and is entirely sound in that regard. But it does not touch the question as to the power of the United States to acquire the mere use of land without exclusive jurisdiction therein. Nearly all the powers of government are exercised over territory in which the United States and the several states have concurrent jurisdiction. It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory. It is very true that the consent of the state legislature is required in order to give the United States this exclusive jurisdiction. But that is all. It is not required when exclusive jurisdiction is not sought. On the contrary, the government, if it sees fit, may condemn land for its purposes without the consent of the state. Thus it was decided by the supreme court in the case of *Kohl v. U. S.*, 91 U. S., 367, that the government of the United States may exercise the right of eminent domain within a state, for the purpose of condemning land for the use of a post-office building, and may, for this purpose, resort to its own courts. In such a case there cannot be a doubt that the post-office building could be erected and used by the government without asking the consent of the state legislature. Such consent would, indeed, be necessary to vest in the United States exclusive jurisdiction over the post-office building and grounds; but it would not be necessary to enable the government to use the property for the purpose for which it was acquired. And so of any other property wanted for a public purpose; the consent of the legislature is not necessary to its acquisition, or to its use; but only to the exclusion of state jurisdiction over the place. That jurisdiction, if allowed to remain, will extend to the punishment of crimes committed against state laws therein, and to the service of state process, but, of course, cannot interfere with the execution of the United States laws, nor with the performance, by United States officers and agents, of the duties devolved upon them.

"In short, cession by a State is only necessary to

extinguish its jurisdiction, in whole or in part, and is not necessary to the use of the land by the United States for public purposes—subject, like all lands within the limits of the Union, to the concurrent jurisdiction of both governments; that of the United States being supreme. The laws of the latter are supreme everywhere, in the States as well as in the territories of the United States; but have exclusive force within the States only in such places as have been ceded by them. The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes. And as one of these purposes is the regulation of commerce among the several states, and as that involves the needs and ways of intercommunication, it follows that congress may provide for these necessities whether the states co-operate and concur therein or not.

"But, secondly, it is contended that, if the United States can constitutionally take the land of the State as well as that of the citizen for public purposes without consent, it can only do so in the same manner and subject to the same conditions—namely, that of making just compensation. It is urged that the language of the fifth amendment of the constitution is applicable to the case and is imperative. This language is: 'Nor shall private property be taken for public use without just compensation.' It is insisted that the property of the State in lands under its navigable waters is private property and comes strictly within the constitutional provision. It is significantly asked, Can the United States take the State house at Trenton and the surrounding grounds belonging to the State and appro-

priate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory.

"The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the king, *in trust*, for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large.

"It is true that to utilize the fisheries, especially those of shellfish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title of the remainder.

"Such being the character of the State's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The fifth amendment provides only that private property shall not be taken without

compensation ; making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water-way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care.

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them ; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient.

"Entertaining these views with regard to the power of Congress over the whole subject of the regulation of

commerce among the several States, including the navigable waters of the country, and the lands under the same, as subsidiary to that end, we have no hesitation in declaring our opinion to be that the authority given by the Act of June 16, 1886, to build the bridge in question, and, for that purpose, to erect the necessary piers of such bridge upon the lands under water of Arthur Kill, is valid and constitutional, and does not injuriously affect any property or other rights of the State of New Jersey. This conclusion resolves also the other questions remaining unanswered with regard to the true construction of the act, and the capacity of the defendant The Staten Island Rapid Transit Railroad Company to perform the acts necessary to execute the authority given by Congress."

Similiar Decision in Hawkins Point Light House Case.

A similar question subsequently arose in the Circuit Court for the District of Maryland in the Hawkins Point Light House Case, Chappell vs. Waterworth, 39 Fed. Rep., 77. In that case the plaintiff, by action of ejectment, sought to dispossess the United States of a light-house, built by the United States Light-House Board in the year 1868, under authority of Congress. The light-house was erected upon piles in the waters of the Patapsco River, where the tide ebbs and flows, at a distance of about 210 feet from the shore. The natural depth of the waterway at the channel opposite this point was 16 feet, but it had been deepened to over 27 feet for the purpose of admitting large ocean steamers. This channel had been deepened by the United States authorities and was under their constant supervision. This Hawkins Point light, as located, was required for the safe navigation of this channel. The plaintiff's title was derived from the State of Maryland by grant. He owned all the right and title in the upland and the

shore opposite the light-house, and all the title in the bed of the river which the State could grant, and under the grant of the State by statute of Maryland, he was declared to be entitled to the exclusive right of making improvements into the waters in front of his land, but such improvements could not be made to interfere with the navigation of the stream of water. The plaintiff had never availed himself of the right of improvement out into the water covered by the light-house, but the right to do so was averred to be, and was found by the Circuit Court to be a valuable riparian right. No compensation was made to the plaintiff for the use of the land by the United States; no condemnation of the site was had. The case came before MORRIS, J. His holding was that the plaintiff was not entitled to any compensation. He says, at page 87:

"It is conceded that the Hawkins Point light, as now located, is required for the safe navigation of the channel by ships engaged in foreign commerce. It covers an area of only 27 feet square. The plaintiff has acquired by grant and now owns all the title and right in the upland and the shore opposite this light-house, and in the bed of the river covered by this structure, which the state could grant away, and has the riparian rights specially conferred by the Maryland act of 1862, c. 129, by which it was enacted that 'the proprietor of land bounding on any navigable waters of this state is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land. Such improvements and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which said improvement is made.' In fact, the plaintiff never has availed of this privilege of improving out into the water covered by the light-house, but the right to do so is a valuable riparian right, not to be arbitrarily or

capriciously destroyed. *Yates v. Milwaukee*, 10 Wall, 504. It is, however, a privilege which must be exercised subject to the right of the public to use the river for the great primary and paramount purpose of navigation, and for furnishing the usual and necessary aids to navigation.

"The ruling in *Yates vs. Milwaukee* was that when under legislative permission, or in accordance with his privilege as a riparian owner, the owner of land bounding on a navigable stream has actually made his improvement, and by such improvement that portion of the stream so improved or reclaimed has ceased to be part of the navigable water, and is appropriated to private use, it can then only be taken to improve navigation upon proper compensation being made, as for any other strictly private property. Such was the effect of the mandate of the Supreme Court in that case in reversing the decree below. But while the submerged lands remains a part of the bed of the river it is not private property, in the sense of the fifth amendment to the Federal Constitution. As was declared in *Gilman vs. Philadelphia*, 3 Wall. 725, the navigable waters 'are the public property of the nation, and subject to all the requisite legislation of congress.' In the hands of the state or of the state's grantee the bed of a navigable river remains subject to an *easement of navigation*, which the general government can lawfully enforce, improve, and protect. It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that, in order to develop the greatest public utility of a water-way, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. The following are cases all involving that proposition: *The Blackbird Creek Case*, 2 Pet. 245; *Gilman vs. Philadelphia*, 3 Wall, 713; *Pound vs. Turck*, 95 U. S. 459; *Wisconsin vs. Duluth*, 96 U. S. 379; *South Carolina vs. Georgia*, 93 U. S. 4.

"If it were made apparent to congress that any extension of the plaintiff's present shore line into the river tended to impair the navigability of the stream, or its use as a highway of commerce, congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended and the plaintiff would have no claim for compensation. * * * It appears,

therefore, that the private interest granted to the plaintiff in the soil in question was of necessity granted to him subject to the use which the United States is now making, of it in aid of navigation, and that the special plea to plaintiff's action of ejectment sets up a perfect defense to the action. The plaintiff's replication to the defendant's special plea simply avers that, when possession of the submerged land was taken by the United States as in the plea alleged, the plaintiff held title to it under the grants from the state, and still holds said title, and that he has never been paid or tendered any compensation therefor. This, in my opinion, is no answer to the plea, and the defendant's demurrer to it is sustained."

It is difficult to perceive any essential distinction in the relation sustained to the general government by the defendant railway companies, and by the grantee of the State of Maryland in the Hawkins Point Light House Case; or by the State of New Jersey in the case decided in 32 Fed Rep. As owner of the lands under Arthur Kill and as proprietor of the lands under the Patapsco River in the Hawkins Point Case, the ownership was subject to the right of the public in the navigable waters. The defendant railway companies have acquired ownership in their right of way as agencies of the State and national governments, subject to the right of the public to use the said lands for state commerce, interstate commerce, and postal purposes. They do not hold the lands as a private land owner holds his lands, any more than the State of New Jersey did in the one case considered by Justice BRADLEY, or than Chappell did in the case considered by Judge MORRIS. The method in which the public shall utilize the lands for the advancement of interstate commerce or for postal purposes under the decisions, cited *ante*, and many other decisions of this Court, is to be determined by the discretion of Congress in that respect; and Congress has in some cases

defined what these railway companies must do. Thus Congress has provided by Act of June 15, 1866, C 124, 14 Stat. 66 (See 5258 Rev. Stats.) that

"Every railroad company in the United States whose railroad is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, Government supplies, mail, freight and property on their way from any State to another State, and receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for transportation of the same to the place of destination. But this section shall not affect any stipulation between the Government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which such railroad or connection may be proposed. And Congress may at any time alter, amend, or repeal this section."

The subsequent Act of March 3, 1873, c. 252, 17 Stat. 584 (Rev. Stats. Secs, 4386 to 4389), regulating the transportation of livestock over interstate railroads. The Act of May 29, 1884, c. 60, Sec. 6 (23 Stat. 3132) prohibits the transportation by railroads of livestock affected with any contagious or infectious disease. The Act of February 4, 1887, c. 104 (24 Stats, 379), with its amendments of March 2, 1889, c. 382 (25 Stats. 855), February 10, 1891, c. 128 (26 Stats. 743), creates the interstate commerce commission. The Act of October 1, 1882, c. 1063 (24 Stats. 531), provides for arbitration between interstate railroad companies and their employes. The Act of March 2, 1893, c. 196 (27 Stats. 531), requires the use of automatic couplers on railway trains.

Whatever expenditure or expense such compliance with the provisions of the foregoing Acts would require, clearly would not be subject-matter for compensation under the Fifth Amendment of the Constitution of the United States. So with regulations respecting the carrying of the mails and the requirements to comply with the regulations of the departments of the Government—these would not be the subject-matter of compensation under the Fifth Amendment to the Constitution. The compliance with requirements of this character would not be interfering with any property right of the railroad companies. Just as in the New Jersey Case, the construction of the bridge and the planting of the piers upon lands under water in such a way as not to interfere with navigation, the primary and general purpose to which the land was subjected, did not interfere with the general purposes for which the land was burdened, therefore Justice BRADLEY found that it was not the taking of anything for which the State was entitled to compensation; so in the same manner the placing of telegraph lines under the Act of Congress of July 24, 1866, under the navigable waters of the States, in such a way as not to interfere with the navigation of such river, would not be a taking of anything which the State, as proprietor of the land under water, would be entitled to claim compensation for. Undoubtedly cables could be laid under the bridge across the Kill, under the waters, under the Act of July 24, 1866, and subject to its conditions, and Justice BRADLEY'S opinion and reasoning would equally apply to a demand made by the State of New Jersey for compensation for the laying of such cables thereunder. The placing of poles and wires along a railway under the Act of Congress is in advancement of the broad

general purpose for which the right of way is taken, to wit; the carrying of interstate commerce thereon, and for postal and military purposes. It does not interfere with the primary general use for which the railway company holds its right of way, to wit, the carriage of goods and passengers; because such non-interference is the condition upon which they are permitted to be placed thereon, and the railway company, as the owner of the land, occupies precisely the relation to the question of compensation that the State of New Jersey did, or as the private owner under the Patapsco River did in the Hawkins Point Case.

This position does not conflict in any respect with the principles announced by Mr. Justice BREWER in the St. Louis case, cited *ante*, because in that case compensation was allowed to the city because of the fact, as clearly defined in the opinion, that there was a necessary interference to the extent of the exclusive occupation by the poles, with the ordinary travel and use of the highway, and for that, and for that alone, the city was held to be entitled to compensation in that case (see opinion by BREWER, J., p. 14, U. S.; pp. 101, 104).

If it be said that, under the principle announced in *Yates vs. Milwaukee* (10 Wall.), the railway companies have improved the land in question, that the telegraph lines necessarily affect and destroy a portion of these improvements, then the complete answer to the suggestion is that, under the principles announced in that case, all that they would be entitled to would be the extent to which their improvements are affected and diminished in value. It would not in any manner affect the right of Congress to regulate the use of the land for the public benefit.

Conclusion.

It is insisted, therefore, upon the views which have been urged in the foregoing argument, that the Circuit Court, following the decision of the Circuit Court of Appeals, was clearly wrong in holding that the bill filed in this cause by the Western Union Telegraph Company presented no equity upon its face. It fully set forth the rights of the Western Union Telegraph Company under this Act of Congress of July 24, 1866. If it be the opinion of this Court that this act only gives the right to a telegraph company to occupy the right of way of a railway company upon the payment of compensation, the bill fully presented that aspect of the case. If it be the opinion of this Court that such an ascertainment of compensation is the peculiar function of a court of law, and not at all of a court of equity, the bill presented that phase of the question, because it set forth as an exhibit a copy of a petition filed upon the law side of the court, asking that Court to proceed to ascertain and determine the amount of compensation which the telegraph company should pay to the railway company, and asked, as a ground of equitable relief, that, pending that determination, the Court would stay the hand of the defendant railroad company, a legitimate ground of equitable interposition to preserve the property and the *status quo* pending the determination of the legal rights of the parties. This law case then became the principal controversy, and the equitable bill was in aid of the proceeding at law to preserve the rights of the parties pending the determination of their rights at law.

If, on the other hand, this Court, following the long line of authorities cited *ante*, should be of the opinion that the action may legitimately be brought, under the facts presented in the bill, by a suit in equity, and compensation there determined, then the bill presents a full and complete statement of the rights of the parties and the equity arising therefrom under the Act of 1866, and asks the Court to protect its rights and stay the hand of the defendant railway companies while the Court ascertains the amount of compensation which shall be awarded for the continuance of the structures upon the right of way. If the Court should take the view that this case falls within the principles announced by Mr. Justice BRADLEY and followed by Judge MORRIS, equally the bill presents the clear grounds which require the reversal of the decision of the Circuit Court of Appeals and of the decree of the Circuit Court for the District of New Jersey.

Respectfully submitted,

RUSH TAGGART,

Solicitor for Western Union Telegraph Company.

JOHN F. DILLON.

RICHARD VLIET LINDABURY.

HENRY D. ESTABBOOK,

Of Counsel.

Office Supreme Court
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Supreme Court of the United States.

OCTOBER TERM, 1904.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

THE PENNSYLVANIA RAILROAD COMPANY and the UNITED NEW JERSEY RAILROAD and CANAL COMPANY,
Appellees.

Nos. 89, 120.

Brief of Appellant in Reply.

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Solicitor for Appellant.

JOHN F. DILLON,
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HENRY D. ESTABROOK,
Of Counsel.

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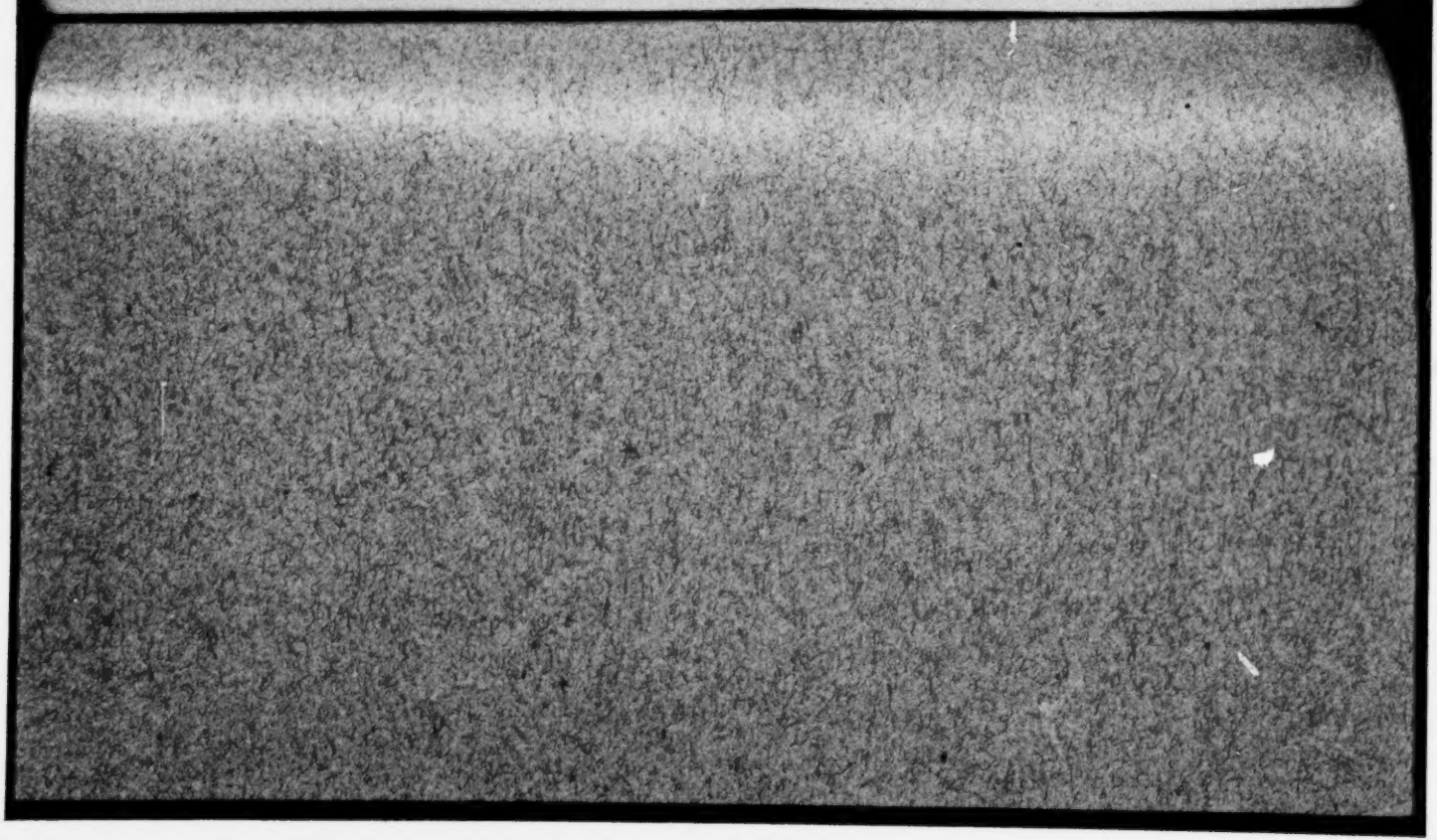

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, vs. THE PENNSYLVANIA RAILROAD COMPANY and the United New Jesey Railroad & Canal Company, Appellees.	October Term, 1904, No. 89.
THE WESTERN UNION TELEGRAPH COMPANY, Petitioner, vs. THE PENNSYLVANIA RAILROAD COMPANY and the United New Jersey Railroad & Canal Company.	No. 199.

1. Requirement to remove lines of telegraph company.

It is claimed in the brief, that whatever right the telegraph company may have to occupy the premises of the defendant under the Act of 1866, it cannot assert such right against its agreement

with the Pennsylvania Railroad Company of September 20, 1881, without first vacating the defendant's premises.

It is said (Brief, p. 80): "We assert in the present case that possession was given to the appellant upon its express abandonment of all rights and easements theretofore vested in it. It admitted as a condition precedent to the contract under which it was allowed to occupy the right of way for twenty years that 'the rights and easements of the telegraph company upon the right of way of said railway company shall be such only as are granted by this agreement and shall cease with its termination.'"

How baseless this argument is will appear at once by reference to the verified bill of complaint, which, for the purposes of this argument, must be taken as confessed, since the Court, *sua sponte*, dismissed it as wholly without equity.

The bill shows that the Telegraph Company did not *enter* upon the defendants' right of way under the agreement of 1881; that it did *not* erect its poles and wires under this agreement, or under any agreement, a term of which was that it would remove them "at a certain time or after a certain notice." The defendants' entry into possession of the complainant's right of way was made and its poles and wires were erected many years before the agreement of September, 1881, was entered into, and, therefore, it will not do to say for any purpose whatsoever that the existing situation was created by virtue of anything contained in that agreement.

It is further said (Brief, page 81) that the contract of 1881 provides that "the rights and easements of the Telegraph Company upon the right of way of the railroad company shall be such only as are granted

by this agreement, and shall cease with its termination," and that by this provision the telegraph company waived all rights upon the railroad of the defendant company other than those conferred by that agreement, including in the waiver any that existed under the Act of 1866.

The answer to this is:

(*a*) That by reading the whole paragraph from which the above excerpt is taken, it will appear that what the telegraph company relinquished was only contract rights existing under prior or other contracts, and not rights existing under its charter or by operation of law. The provision is that:

"Any easement or right of way heretofore acquired by the Telegraph Company upon any of the roads embraced in this agreement, *either directly by contract or by assignment of contracts or agreements made by companies with the railroad company, or with any other of the companies whose roads or property are embraced in the schedule hereto attached*, is hereby relinquished and abandoned, and the rights and easements of the Telegraph Company upon the right of way of said Railroad Company shall be such only as are granted by this agreement, and shall cease with its termination."

(*b*) That it was beyond the power of the telegraph company to waive the rights acquired by it under the Act of 1866, and that, if it attempted to do so by this agreement, such attempt was futile.

The rights conferred upon telegraph companies by the Act of 1866 are not conferred for the private benefit of such companies, but for the service of the public and the Government. They are expressly made non-assignable, and the companies are required to agree that they shall be subject to acquisition by the Government, if the latter

shall require them. Manifestly the companies cannot take up these rights or lay them down at will, and, having taken them up and entered into a solemn compact with the Government, they cannot dispose of them in derogation of that contract. Nothing is better settled than an alienation, whether voluntary or involuntary, of the franchises of a quasi-public corporation, or of the property necessary to the exercise of such franchises, is illegal and void.

Suppose that the Pennsylvania Railroad Company had acquired a portion of its right of way by lease (as many railroad companies have done) and had agreed in such lease to vacate the premises at the end of the term, waiving all rights, public or private, which it had, might have or could have in the premises, otherwise than under the agreement, would anybody contend that in such a case the railroad company could not condemn a further estate in the leasehold property until the end of the term and until it had removed its tracks and traffic therefrom? We imagine not, and yet, unless such a contention could be made, and could be made good, the argument for the defendant on this point, even conceding the correctness of its false premise, must fail.

Justice vs. Ry. Co., 87 Penn. St., 28.
Heise & Mifflin vs. Penn. R. R. Co., 12 P. J. Smith, 62 Penn. St., 67.

1. Doctrine of Landlord and Tenant.

Appellees further invoke the rule which denies to a tenant the right to impeach the title of his landlord, or to hold over after the end of his term under a title adverse to that of his landlord.

We submit that the rule invoked has no application to this case.

(1) It is limited to cases where the tenant has entered under the lease set up, and therefore does not apply to cases where the tenant's possession antedates such lease.

Tewksbury vs. Magraff, 33 Cal., 245.
Franklin vs. Merida, 35 Cal., 558.
Insurance Co. vs. Stroup, 63 Cal., 153.
Davis vs. McGrew, 82 Cal., 135.
Tullis vs. Tacomo Land Co., 19 Wash., 140.
Phillips vs. Smoot, 1 Mackey (D. C.), 478.

(2) It is also limited to cases where the title set up was acquired by the tenant from a third party, and does not apply where the title was in the tenant himself at the time of the lease.

Thus, in *Accidental Insurance Co. vs. Mackenzie*, 10 Common Bench Reports (N. S.), 870, it was held that

"where a person having possession of land under a good title, became tenant, and paid rent to a stranger, he was not estopped after his tenancy was determined, and before he had given up possession of the premises, from setting up his own prior title in an action of ejectment by his lessor."

In this case the defendant went into possession of certain premises under an agreement with Messrs. Maltby & Company, who were lessees under the Bank of England. After the making of this agreement Messrs. Maltby & Company, being in difficulties, made an assignment of their whole term to the plaintiffs. From that time the defendant paid rent to the plaintiffs and submitted to a distress put in by

them. Thereafter the plaintiffs gave notice to the defendant to quit, which the latter refused to do. Thereupon the plaintiffs brought an action of ejectment. The defendant set up his prior title under the agreement with Maltby & Company, but the plaintiffs had judgment upon the ground that the defendant was estopped from denying the plaintiffs' title. On rule to show cause Chief Justice EARL said:

"I am of opinion that this rule should be made absolute on the point of law. This was an action of ejectment for premises to which the plaintiffs had no title whatever; and, the defendant having a title, the parties came to an agreement that the plaintiffs should demise to the defendant what he already had a good title to. What effect this might have had as to estopping the defendant from disputing the plaintiffs' title during the continuance of the demise we are not called upon to determine. Here the plaintiffs put an end to the tenancy and then brought their action of ejectment, and now they strive to keep their verdict, *on the ground that the defendant was estopped from disputing their title until he had restored the premises into their possesseon.* If that rule applied, the verdict would stand, and the moment after the defendant might be plaintiff in another action of ejectment and recover the same premises. I am fully aware of the salutary effect of the rule that the party *who has derived possession from another* shall not dispute his title until possession has been restored. I quite agree with Mr. Brown (plaintiffs' counsel) as to the effect of the cases he had cited, where one party has attorned to another; and I entirely adhere to the principle laid down in those cases *that it is not competent to set up the title of a third party unless there has been fraud or misrepresentation.* But, giving full effect to the general principle, *I can find no authority for the doctrine that a person taking a lease of his own land is not entitled, at the expiration of the*

term, to dispute the title of his lessor. We do not overrule any authority, but, on the contrary, we agree with the passage cited from Co. Litt."

WILLES, J., said:

"I am of the same opinion. I admit the importance of the rule obliging the person who has obtained possession of property as a tenant to another to give up possession to his landlord, *and not set up the title of a third party*, and that this rule is binding. But this is a case where the title of the tenant continuing after his tenancy expires, he is desired to give up possession at the end of his term. If the plaintiffs were to recover in this action, the plaintiff might bring ejectment and recover the same premises on exactly the same evidence as has been given in this action."

BYLES, J., concurred.

This judgment, by one of the strongest Courts that England ever had, seems to be exactly applicable to this case.

If it be true, as we think we have demonstrated *ante* in our main brief, that the appellant has a right to occupy the appellees' right of way under the Act of 1866, and it be also true, as appellees must concede, that that right was as complete and perfect when the lease of 1881 was made as it is now, and such right has not expired, but, as the bill puts it, is a continuing right based upon a continuing consideration, then the exact counterpart of the English case is presented and the argument is fully answered.

(3) The rule is further limited to cases where the title set up accrued before the lease was made. It has never been held that a tenant might not set up, at the end of his term, in defense of his possession, a title acquired by him either from his landlord or

a third party, provided such title arose after the making of the lease.

Thus, the rule is stated in *Howell vs. Ashmore*, 2 Zab., 265, as follows:

"A tenant who enters upon premises by virtue of a lease, or by permission of another, is not permitted, in an action by the landlord, to dispute the title of the latter, which by his own act he has acknowledged."

In 2 *Taylor's Landlord and Tenant*, Sec. 705, it is said:

"But the rule that a tenant is precluded from denying the title of his landlord is not to be extended so as to estop him from denying the validity of rights which had no existence when he took possession, and he will be estopped from denying only what he has once admitted."

In *Chamberlain vs. Perry*, 138 Mass., 546, it was held that

"The owner of an equity of redemption of land, not in possession, and not entitled to possession, as against an equitable assignee of the mortgage, cannot maintain an action on the General Statutes, Chapter 137, to recover such possession, against one who originally entered as his tenant under a lease for a year, but who, before the expiration of the year, took a lease from the equitable assignee of the mortgage, and who, at the time of the bringing of the action, which was after the expiration of the year, was in possession under the latter lease."

In *Shields vs. Lozear*, 5 Vr., 496 (N. J. Ct. of Err. & App.), it was held that

"A tenant who holds a mortgage on the demised premises, the money secured by which is due on the day on which his lease expires, may continue to hold the premises under the mortgage, the mortgage money not being paid, without first surrender-

ing the premises to the landlord, although in the lease he has covenanted to yield up and surrender possession of the premises to his landlord at the expiration of his term."

The opinion is by Mr. Justice DEPUE. He said:

"But the argument of the plaintiff's counsel is that although the defendant's title under his mortgage was derived from the plaintiff, yet that the obligation of the defendant springing from the relation of tenancy was first to surrender and yield up to his landlord the possession of the premises, in obedience to his covenant to surrender at the expiration of the term, before he was to be permitted to assert any possession under the mortgage. The law does not carry the fealty of the tenant to his landlord to such extent."

And he added:

"If the position contended for be conceded, this result will follow: That if a tenant, during the continuance of his lease, obtain a new lease for the premises for an additional term commencing at the expiration of the term of his existing lease, he cannot enter and hold under his new lease, or defend an action of ejectment brought against him by his landlord, unless he first surrender the possession to his landlord and is by him re-admitted into the possession."

In *De Camp vs. Hibernia Railroad Co.*, 18 Vr., 43, it was held that a railroad company in possession under a lease could condemn a right of way over the demised premises, notwithstanding the lease had not expired, and notwithstanding its covenant in the lease to surrender the premises at the end of the term.

Here the right set up, in so far as it is a new right, is based on the complainant's authority to condemn, and its tender of compensation. It does

not, therefore, involve a denial of any title under which the complainant either entered or held, or which it has by such entry or holding once acknowledged.

But there is still another and more conclusive answer than any of the foregoing to the defendant's contention on this point. It is that whatever the technical rules of law might require in the case of individuals, the public convenience will not permit a *quasi* public corporation discharging public and governmental functions, and being in possession of property necessary for the discharge of such functions, to be turned out of possession by the owner of such property upon any rule or theory of law, provided it is willing and offers to make constitutional compensation to the landowner for such property.

Thus, in *New York vs. Pine*, 185 U. S., 700, Justice BREWER, speaking the unanimous judgment of the Supreme Court of the United States, said:

"A railroad corporation, being one charged by the law with performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the

public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy."

See also Joy v. St. Louis, 138 U. S., 1-47.

It is on account of the public convenience, and not at all out of consideration for their private rights, that railroad companies entering upon private lands and constructing their railroads thereon without authority of law, or entering upon conditions afterwards and often inexcusably broken, are allowed to maintain themselves in possession upon making compensation.

Thus in *Conger vs. B. & S. W. R. Co.*, 41 Iowa, 419, a railroad company had appropriated a right of way without compensating the owner therefor, although damages had been assessed. Held that ejectment would lie, but that execution for possession should not issue until the company had been granted a reasonable time, fixed by the Court, in which to pay the assessed damages and interest thereon from the date of the assessment.

In *Harrington vs. St. Paul & Sioux City R. Co.*, 17 Minn., 215, the defendant railroad company had constructed a railroad without lawful right and under circumstances which were adjudged to amount to a trespass and a continuing one. Nevertheless, on application by the landowner for an injunction the Court, following the English cases,

held that where a perpetual injunction may occasion great inconvenience to the public, as well as to the defendant, before a right of way can be obtained pursuant to law, the judgment should be in respect to the injunction that it do not issue if the defendant forthwith institute proceedings to condemn the land and promptly prosecute the same.

In *Pittsburg & Lake Erie Railroad Co. vs. Bruce*, 102 Penna. St., 23, a landowner was held entitled to recover in ejectment against a railroad company because it had occupied his premises for its right of way without authority of law; nevertheless, the Court declared that as the railroad company had a right to condemn, if the plaintiff should refuse a stay of execution until that could be accomplished, the Court below should, on application, interpose its injunction.

In *New York & Greenwood Lake Co. vs. Stanley Heirs*, 8 Stew., 283, the Montclair Railway Company had entered into an agreement with the land owner for the occupation and use of his land in consideration of the company's building a depot on the premises and certain arrangement for the running of trains. It had made default in this agreement, and the land owner had brought ejectment and recovered judgment for the possession. Thereupon the Chancellor granted an injunction until the railroad company could condemn a right of way over the plaintiff's property, and the Court of Errors affirmed the order.

In *Paterson, Newark & New York R. R. Co. vs. Kamlah*, 15 Stew., 93, the defendant claiming that he had never received compensation for a strip of land used by the complainant, brought ejectment therefor; thereupon complainant obtained a preliminary injunction to stay the action, on the ground that it had legal title to the land. The

title failing the injunction was continued until the railroad company could have compensation determined at law or in equity.

A notable instance of the application of the foregoing principle is that of the elevated railroad cases in New York. In these cases the Court ascertains the value of the easements taken by the elevated railroad company and decrees that unless payment of such sum be made by the railroad company an injunction shall issue restraining the railroad company from continuously trespassing upon the plaintiff's property, and also requiring the owner of the property to execute a deed to the railroad company for the easements upon the payment of the value of such easements as ascertained by the Court (Galway vs. Elevated Railroad Co., 128 N. Y., 132; Shepard vs. Elevated Railroad Co., 117 N. Y., 422).

These cases are cited with approval, with others, by THAYER, J., in the opinion in St. Paul, Minneapolis and Manitoba Railway Co., appellant, against the Western Union Telegraph Company and the Northwestern Telegraph Company (118 Fed. Rep., 469).

Absence of Necessity.

The defendant contends that the use of its right of way is not necessary to the complainant, as the latter can be accommodated on the public streets and highways (Brief, p. 81).

In answer to this, it is enough to refer to the language of Judge KNOWLES, in Postal Telegraph Co. vs. Oregon Short Line Co. (114 Fed., 789), where he said

"the Act of Congress itself determines whether the power of eminent domain should be put in motion for the purposes named, and whether the exigencies of the case and the public welfare require or justify its exercise."

And to that of Justice FIELD, in Boom Co. vs. Paterson, 98 U. S., 403 (quoted by Judge KNOWLES), as follows:

"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested."

Again, the right of the Federal Government is to take this particular property for governmental use, and it no more lies with the defendant than with the complainant to say that some other property would do as well. In the Act of Congress of July 24, 1866, Congress named the species of property to be taken. It named "Post Roads," meaning by that term certainly all then existing "Post Roads." That term included this railroad as definitely as though named.

In the appellee's brief (p. 81), it is said "If there was no other method by which the telegraph company could transact its business saving upon the roadbed of the appellees, there might be a little gloss for its assertion that a waiver of its rights of occupancy therein would interfere with a public function. It will hardly be pretended, however, that telegraphic communication across the States of Pennsylvania and New Jersey cannot be secured, saving upon lines of poles and wires erected upon this roadway."

It is sufficient to say that if the right is given as contended for by the appellant under the Act of Congress of July 24, 1866, it is no answer for the appellees to say that a location could be made elsewhere.

In addition it may be suggested, that if the construction contended for by the appellees be given to the Act of Congress of July 24, 1866, it needs no prophet to say that the extension of telegraph lines across the States of Pennsylvania and New Jersey will be so impeded that it will amount to a practical prohibition upon the construction of such lines. Let it be known that this Court has construed the Act of Congress as limited by the appellees, and the extension of telegraph lines will be very difficult and so expensive as practically to put a prohibition upon the further construction of lines of this character.

In the brief of appellees reference is frequently made to matters set forth in the affidavits filed by appellees in the Circuit Court of New Jersey, upon application for preliminary injunction. In the affidavits alone will be found any suggestion of any want of space along and upon the right of way of the appellees for the continued location and maintenance of appellant's telegraph lines. Likewise in those affidavits alone will be found any reference to any contract with the Postal Telegraph Cable Company for the maintenance of telegraph lines along the right of way of the appellees. The contention of the appellant, in view of the action of the Circuit Court and of the Circuit Court of Appeals is that none of the matters as stated in the affidavits are legitimately to be considered as bearing upon the questions involved in this case. The Bill of Complaint was considered by the Circuit Court of Appeals as upon a general demurrer, and held not to be founded upon any equity in view of the facts stated therein, assuming all those facts to be true. Such was the view taken of the bill by the Circuit Court in dismissing it *sua sponte*, and it would be manifestly unjust to the appellant,

upon the *ex parte* statements contained in an affidavit, to consider matters purely of defense, when the defendants failed to plead, and no testimony has been taken in the case.

The matters of fact stated in affidavits could only be promptly considered by this Court after the witnesses had been produced with opportunity to the appellant to cross-examine and test their story. The inequity of treating statements in the affidavits as truth is manifest in the matter of the alleged claim that the Postal Telegraph Cable Company has an antecedent right upon the right of way of the appellees. Although the Postal Telegraph Cable Company's contract is dated June 25, 1902, yet in the *ex parte* affidavit, the appellee's officer does not venture to allege that that was the date of the execution of that contract. This is a matter to be considered only upon testimony where the other party has a right to cross-examine. This is also true with respect to the pecuniary benefits resulting to the appellees from the alleged contract with the Postal Company. This is a matter also legitimate to be considered only after all the facts have ben elicited in a manner consistent with the rules of law and is not to be taken upon *ex parte* statements from affidavits.

Respectfully,

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JOHN F. DILLON,
RICHARD VLIET LINDABURY,
HENRY D. ESTABROOK,
Of Counsel.

NO. 90. OCTOBER TERM, 1904.

Office Supreme Court
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JAMES H. McKENN

IN THE

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner in Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR PETITIONER IN ERROR.

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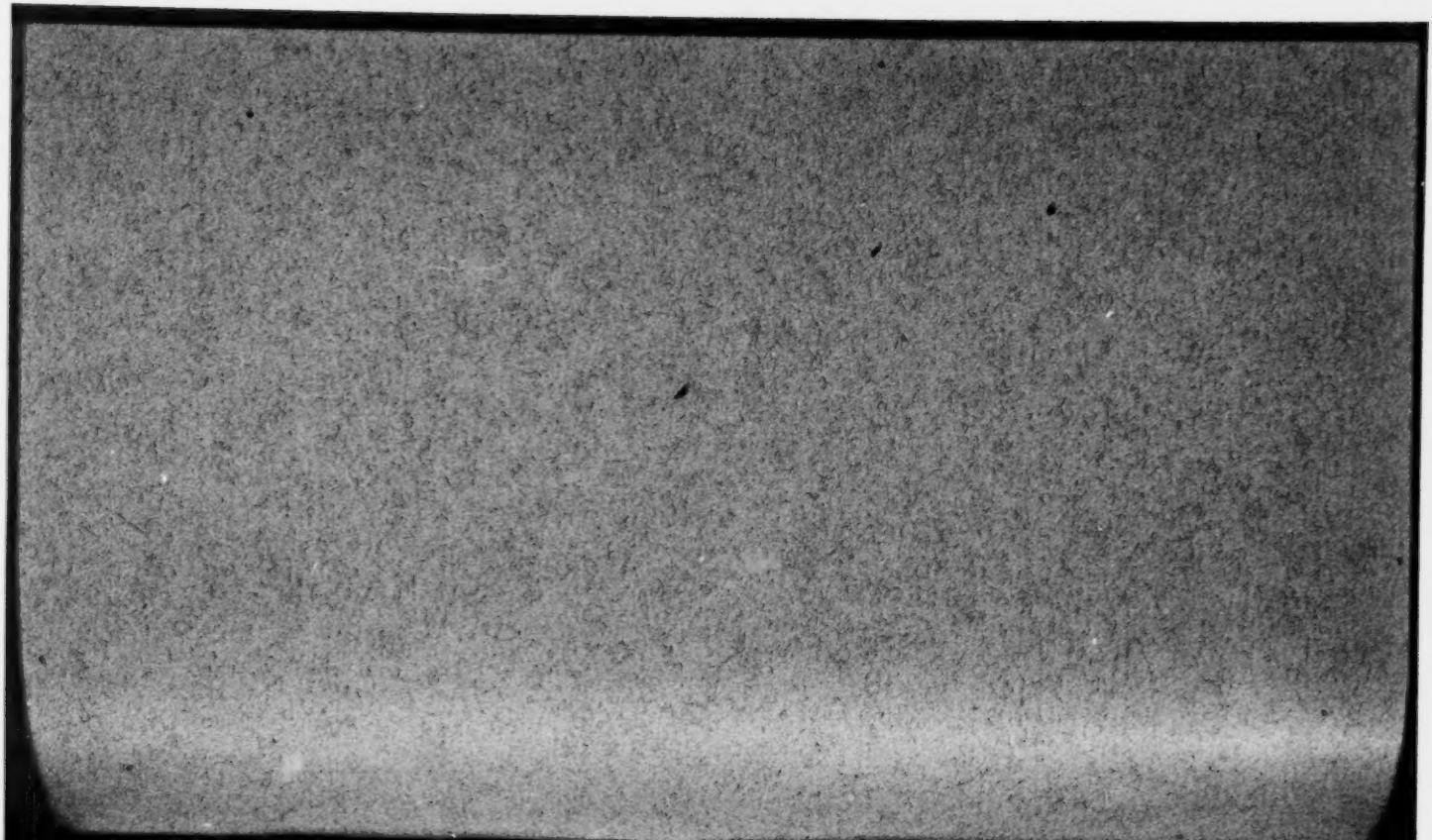

IN THE

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THE WESTERN UNION TELEGRAPH COMPANY
Petitioner-in-Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.
Defendant-in-Error.

No. 90.
October Term,
1904.

BRIEF FOR PETITIONER IN ERROR.

The Issues.

There are two issues involved in this controversy:

FIRST. Whether, by accepting the burdens, obligations and restrictions of the Act of Congress, July 24, 1866, a telegraph company is thereupon vested with the right to use the right of way of a railroad company, being one of the post-roads of the United States, so long as the use contemplated shall not interfere with the ordinary travel upon such post-road, and upon making just compensation therefor.

SECOND. Whether the Atlantic and Ohio Telegraph Company, a domestic corporation of Pennsylvania, has the right under its charter to

use the right of way of the Pennsylvania Railroad Company, a domestic corporation of Pennsylvania, under the laws of said State; and whether, as lessee and assignee of the property and franchises of the Atlantic and Ohio Telegraph Company, the Western Union Telegraph Company, a corporation of New York, has the right in its own name to exercise the powers and enjoy the franchises of its lessor.

An affirmative answer to the first of these questions would make unnecessary a consideration of the other.

Statement.

At the May Term, 1903, in the Circuit Court of the United States for the Western District of Pennsylvania, a petition was filed by the Western Union Telegraph Company, a corporation of New York, against the Pennsylvania Railroad Company, a corporation of Pennsylvania (see Record, p. 2). The petition prays that the Court issue its process, or take such modes of procedure as might be agreeable to the principles and usages of law, to determine the amount of compensation to be paid by the petitioner, the Western Union Telegraph Company, to the defendant railroad company for the use of the right of way of the defendant and its branches and connecting lines, to construct, maintain and operate a line of telegraph over and along the said railways of the defendant, subject to the conditions and provision named in the Act of Congress, July 24, 1866, and the Acts of Assembly of the Commonwealth of Pennsylvania; and that, upon the payment into court, or to the defendant, as the Court might direct, of the amount of such compensation for the said rights and interests ac-

quired thereby by the said Western Union Telegraph Company, possession may be adjudged to the Western Union Telegraph Company of the said use, rights and interests according to law, and that the title to the said rights and interests, as against the defendant, thereby vest in the Western Union Telegraph Company for the purposes aforesaid. The petitioner at the same time tendered a bond in the sum of $100,000, as security for the payment of whatever compensation might be allowed by the Court, and asked that the bond be approved.

On November 20th, 1902, the petitioner presented in open court its petition, and counsel for the defendant railroad company, appearing specially, objected to the Court's receiving the petition for want of jurisdiction. The Court declined to receive the petition or approve the bond, and fixed November 26th, 1902, for a hearing (Rec., p. 2). On November 26th, 1902, the hearing so fixed was had in open court, counsel for the railroad company appearing specially and denying the Court's power to entertain or act in pursuance of said petition, and the case was thereupon fully argued on both sides (*Idem.*).

On the 20th of January, 1903, the following order was made by the trial judge (Rec., p. 70):

"And now, January 20th, 1903, this case having come on for hearing *sur* petition of the Western Union Telegraph Company for the approval and filing of its bond to the Pennsylvania Railroad Company, and for the issuance of process, and the same having been argued by counsel, after due consideration, it is now ordered that said petition be, and it is hereby, dismissed, at the cost of petitioner.

"By the Court,
"Jos. BUFFINGTON,
"Judge."

Whereupon a writ of error was allowed (Rec., p. 71) and assignments of error filed, the same appearing of record (p. 71).

The facts set forth in the petition may be summarized as follows:

The Western Union Telegraph Company was organized as a telegraph company in the year 1851, and from that time to the present has constructed and operated telegraph lines throughout the United States; that its lines connect with ocean cables leading to Central and South America and foreign countries; that it transmits yearly for the public and for the Government of the United States, exclusive of all railroad messages, messages relating to its own business, and messages transmitted over leased or private wires, upwards of sixty-five million messages; that at the present time its system of telegraph lines under its operation and control comprises over 192,000 miles of poles and cables, and over 900,000 miles of wire, its capital stock being distributed among over 11,000 stockholders; that for many years its lines have been relied upon by the Government of the United States, and the Governments of foreign countries, and the public generally for the quick transmission of intelligence to and from all parts of the United States and foreign countries (Rec., p. 2; Petition, Par. 4).

That the Legislature of the Commonwealth of Pennsylvania, by an act entitled "An Act to incorporate the Atlantic & Ohio Telegraph Company," approved the 24th day of March, 1849, duly incorporated the Atlantic and Ohio Telegraph Company by that name and style, with authority, among other things, to make, use and maintain telegraph lines and communications by one or more routes between the cities of Philadelphia and Pittsburgh, and in-

termediate places, and from Pittsburgh to the Ohio State line. That said act gave to the Atlantic and Ohio Telegraph Company express power to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within the State of Pennsylvania, the said works so to be placed as not to interfere with the common use of such roads, highways, streets and waters, and the said corporation, and all other persons by them authorized, appointed or employed, should have power and authority to enter into and upon, hold, occupy and enjoy any lands for the purpose of locating and constructing said telegraph lines, and using, maintaining, repairing and enjoying the same, provided that such compensation previous thereto shall be made, secured or tendered to the owner or owners of any land or lands, as shall be agreed upon between the parties, or in such manner as in said act provided. And the act gave, in the event of a failure or inability to agree upon such compensation, the right to said company to have ascertained the amount of compensation or damages to the owner of lands taken and used by said company for telegraph purposes.

By an act of the Assembly of the Commonwealth of Pennsylvania, entitled, "An Act reviving the Charter of the Atlantic & Ohio Telegraph Company, approved twenty-fourth March, one thousand eight hundred and forty-nine," approved February 25, 1869, the charter of said Atlantic & Ohio Telegraph Company was made perpetual. Annexed to the petition as Exhibit 1 are copies of said acts (see Rec., p. 3, Petition, Par. 5; Exhibit 1, Rec., p. 13).

That on the 15th day of April, 1864, the Atlantic and Ohio Telegraph Company entered into a contract of lease with the Western Union Telegraph

Company, whereby the Atlantic and Ohio Telegraph Company leased and demised to the Western Union Telegraph Company for the term of ten years, commencing on the first day of April, 1864, and continuing thereafter until terminated by six months' notice, at the option of either party, all of the telegraph lines, instruments, property, offices and franchises of the said Atlantic and Ohio Telegraph Company for the consideration mentioned in said lease, copy of which is attached to plaintiff's petition as Exhibit 2 (see Rec., p. 3, Petition, Par. 6; Exhibit 2, Rec., p. 18).

That the Legislature of the State of Pennsylvania passed an act, approved May 3, 1871, entitled "An Act supplemental to an Act entitled 'An Act to incorporate the Atlantic and Ohio Telegraph Company, approved March 24, 1849,' and to confirm certain agreements executed by said company," and by said act of May 3, 1871, the lease aforesaid to the Western Union Telegraph Company was ratified, "the same as if the said lease and contract had been made by virtue of express authority of law," and, by the act last mentioned, it was also provided that said Atlantic and Ohio Telegraph Company should have and possess all the rights, powers and privileges conferred by the third and fourth sections of the act of the Legislature of Pennsylvania to incorporate the Eastern Telegraph Company, approved the 5th day of April, 1866. A copy of the act in question is attached to the petition as Exhibit 3 (see Rec., p. 4; Petition, par. 7; Exhibit 3, Rec., p. 19).

That the third and fourth sections of the act incorporating the Eastern Telegraph Company provided, *inter alia*, that said company should have the power to pur-

chase, make, use and maintain any connecting or side lines of telegraph, a copy of which said sections is attached to the petition as Exhibit 4 (see Rec. as above).

The petition further averred that the Congress of the United States passed an act, approved July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and the Western Union Telegraph Company on or about the 8th day of June, 1867, duly accepted the provisions of said act by filing with the Postmaster-General of the United States, in writing, an acceptance by said company of all the restrictions and obligations of said act, and that it thereby became entitled to all the privileges and rights granted by the said act to telegraph companies thus accepting the benefits, restrictions and obligations of the same; that it had from the time of its acceptance to the present time complied with all the provisions of said act, and had rendered to the various departments and officers of the Government of the United States all the duties and services required by said act, giving to the Government of the United States priority over all other business and at rates fixed by the Postmaster-General, which rates as thus fixed by him, were very much lower than the reasonable rates charged for similar services rendered to the general public. A copy of petitioner's acceptance of the act in question is attached to the petition as Exhibit 5 (see Rec., pp. 4, 5; Petition, Par. 8; Exhibit 5, Rec., p. 20).

The petition further set forth that Congress, by an act approved June 8th, 1872, had declared all railroads or parts of railroads, which then were or

thereafter might be in operation, to be established post-roads of the United States, and by a further act, approved March 1st, 1884, Congress had declared and established all public roads and highways, while kept up and maintained as such, to be post-roads of the United States (Rec., p. 5; Petition, Par. 9).

The petition further averred that the petitioner had the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendant, being, under the laws of Pennsylvania, highways of that State, and, under the laws of Congress, post-roads of the United States, upon making just compensation for the use of the roadway or right of way of the defendant company and so long as it should not interfere with the ordinary travel on such railroad (Rec., p. 6; Petition, Par. 10).

The petition further sets forth that the Pennsylvania Railroad Company was the owner, and in possession, control and operation as owner, of lines of railroad in the State of Pennsylvania, particularly describing the same (Rec., pp. 6, 7, 8; Petition, Par. 12). And that by the Constitution and the general laws of the State of Pennsylvania, the said several railroads described, belonging to the defendant railroad company, were created and made public highways, and as such, subject to occupation and use by telegraph companies under the provisions of the acts of Congress and the laws of Pennsylvania aforesaid (*idem*).

The petition further sets forth that for many years last past there had been maintained and operated over and along the right of way of the railroads specified, lines of telegraph owned, maintained and operated by the Western Union

Telegraph Company, or its predecessors in title or estate, by and with the consent of the defendant, Pennsylvania Railroad Company, or its predecessors in title, which had been so located, maintained and operated as not to intefere with the ordinary operation and management of the said railways, or the ordinary travel thereon. That the petitioner telegraph company was at that time in possession and control of said telegraph lines; that the same were a part of its system of telegraph, and had been continuously operated by it for the transmission of intelligence for the public and the Government of the United States; and that the same had been maintained and operated by the Western Union Telegraph Company for twenty years last past by and with the consent of the Pennsylvania Railroad Company (Rec., p. 8; Petition, Par. 13).

That on the 15th day of May, 1902, the Pennsylvania Railroad Company had notified the Western Union Telegraph Company to remove its poles and wires, and had withdrawn its consent from plaintiff to occupy its premises longer, and that thereupon the telegraph company applied to the railroad company to have ascertained and determined the amount of compensation to which the railroad company would be entitled for the continued maintenance and operation of the said lines of telegraph under and subject to the terms, conditions and restrictions of the act of Congress aforesaid, and subject to the laws and constitution of the State of Pennsylvania, but that the railroad company refused and declined to treat with the telegraph company, or to agree, or attempt to agree, upon the amount of compensation for the uses aforesaid; but

on the contrary, denied that under the acts of Congress, or the acts of Pennsylvania, or the said lease of the Atlantic and Ohio Telegraph Company, the Western Union Telegraph Company had any right whatever to construct, maintain or operate its telegraph lines over and along said railways.

The petition further avers that the lines of telegraph as presently located, maintained and operated can continue to be so located, maintained and operated without interference with the ordinary travel on the said railroads or the ordinary use, management and operation of said railroads, and that the petitioner would so continue to maintain and operate said telegraph lines as not to intefere with the ordinary travel on said railroads, and subject also to the condition that when in the future the location, maintenance and operation of said lines should be found to interfere with the ordinary travel upon and use of said railways, the petitioner would make such reasonable changes in the location, maintenance and operation of any part of its telegraph lines as that the ordinary travel upon the said railways should be and remain free from interference, as provided in said act of Congress (Rec., pp. 8, 9; Petition, par. 14).

The fifteenth paragraph of the petition avers the necessity for taking the property which the petitioner seeks to appropriate to its use (Rec., p. 9).

The sixteenth paragraph of the petition sets forth the corporate action of the Board of Directors of the petitioner telegraph company under the powers vested by the lease from the Atlantic and Ohio Telegraph Company, the Acts of the Assembly of the Commonwealth of Pennsylvania, ratifying and confirming the same, and of all and every other power enabling it in anywise to do so,

locating a single line of telegraph poles and wires over, along and upon the right of way of the defendant railroad company and its branches, attaching a map to the resolution of the board, and describing in a schedule attached to said map the property sought to be appropriated, the same being made parts of the petition marked "Exhibits 6 and 7." This paragraph further sets forth the efforts made and negotiations had with the railroad company to obtain the privilges required, and its failure to agree with the railroad company for the reasons already stated, and which were embodied in a written communication from the railroad company attached to the petition as Exhibit 8 (see Rec., pp. 9, 10, 11, 12, for Exhibits 6, 7, 8; see Rec., pp. 21).

The opinion of his Honor Judge BUFFINGTON, the trial Judge, on the issues involved is set forth in full (Rec., p. 43, *et seq.*).

Technically, all the facts in this particular case must be looked for in this particular record, but, from the opinion of the Trial Judge, which is given in full, it will appear that at the time of the filing of its petition the Western Union Telegraph Company also filed a bill of complaint on the equity side of the court, seeking to restrain the defendant railroad company from destroying petitioner's property pending the final determination of the issues set forth in the petition not only, but for other, and, as plaintiff believed, weighty reasons set forth in the bill of complaint. This court will also take judicial notice of a controversy between the parties hereto, pending on appeal in this Court from an order granting a temporary injunction made by the Circuit Court of the United States for the District of New Jersey against the

Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, enjoining said companies from destroying the property of the Western Union Telegraph Company pending the final disposition of a petition filed in that Court by the Western Union Telegraph Company against the railroad companies, seeking to avail itself of the rights granted it by Congress. It is apparent that the cases are identical in principle, and that the facts, *mutatis mutandis*, are likewise identical. These cases are simply parts of an entire controversy, and the two cases will doubtless be argued together in this Court. We venture to conclude, therefore, that there will be no impropriety if, in the argument of this case, certain facts set forth in the bill filed in the New Jersey case are called to the attention of the Court. The records of the two cases show that the decision of Judge KIRKPATRICK was handed down prior to the decision of Judge BUFFINGTON; while Judge BUFFINGTON refused to allow an injunction, the learned Judge likewise refused, on further consideration, to have an order entered to this effect.

BRIEF OF POINTS.

The Rights of Petitioner under Acts of Congress.

I.

THE WESTERN UNION TELEGRAH COMPANY, PETITIONER, HAVING IN 1867 ACCEPTED THE CONDITIONS IMPOSED BY THE ACT OF CONGRESS, JULY 24, 1866, AND THE VARIOUS ACTS AMENDATORY THEREOF, AND HAVING EVER SINCE FAITHFULLY PERFORMED ALL THE OBLIGATIONS IMPOSED BY THESE ACTS, HAS PAID AND IS PAYING TO THE FEDERAL GOVERNMENT A FULL, ADEQUATE AND CONTINUING CONSIDERATION FOR THE RIGHTS GRANTED BY CONGRESS UNDER THE ACTS AFORESAID, AND HAS THEREBY BECOME NOT ONLY A SPECIAL AND PECULIAR AGENCY OF THE GOVERNMENT, BUT THE GOVERNMENT, UNDER ITS OPTION OF PURCHASE, HAS ACQUIRED A VESTED INTEREST IN THE PROPERTY AND FRANCHISES OF PETITIONER MORE REAL AND TANGIBLE THAN ITS INTEREST OR PROPERTY IN THE PUBLIC MAILS COMMITTED TO ITS CHARGE.

St. at Large. *Vol.* 14, p. 221; copied in R. S., as Sections 5263, *et seq.*

That the Federal Government has a property in the mail see *Scaright v. Stokes*, 3 How., 151.

In re Debs, 158 U. S., 583.

1. Section 4 of the act of Congress, July 24, 1866, provides, "That before any telegraph company shall exercise any of the *powers or privileges conferred*

by this act, such company shall file its written acceptance with the Postmaster-General of the restrictions and obligations required by this act."

2. Section 3 of the act provides, "That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, etc."

3. Section 2 of the act provides "That telegraphic communications between the several departments of the Government of the United States, and their officers and agents shall, in their transmission over the lines of any of the said companies, have priority over all other business.

4. "And shall be sent at rates to be annually fixed by the Postmaster-General."

5. Section 3 of the act further provides "That *the rights and privileges hereby granted* **shall not be transferred by any company acting under this act to another corporation, association or person."**

6. By Act of Congress, June 10, 1872, such telegraph companies are required to transmit meteorological observations of military stations and other points, and notice on the northern lakes and seaboard of approaching storms.

7. And by the same Act it was provided that if any telegraph company, having accepted the provisions of the Act of July 24, 1866, its agents or employees "shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by the general resolution approved the 9th day of February, 1870, to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notices on the northern lakes and seaboards of the approach and force of storms, such telegraph company shall forfeit and pay to the United States not less than one hundred dollars and not exceeding one thousand dollars for each such refusal or neglect. To be recovered by an action or actions at law in any District Court of the United States" (see U. S. St. at L., Vol. 17, p. 367).

II.

THE GOVERNMENT OF THE UNITED STATES HAS JURISDICTION OVER EVERY FOOT OF SOIL WITHIN ITS TERRITORY, AND WITHIN ITS ENUMERATED POWERS HAS FULL ATTRIBUTES OF SOVEREIGNTY WITHIN THE LIMITS OF THOSE POWERS, AMONG WHICH ARE THE POWER OVER INTERSTATE COMMERCE AND THE POWER TO ESTABLISH POST-OFFICES AND POST-ROADS.

1. However acrimonious may once have been the debate as to the meaning and limitations of the constitutional provisions above referred to, "it cannot at the present day be doubted that Congress under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies," has power to pass any laws germane to these subjects.

See

Western Un. Tel. Co. vs. James, 162 *U. S.*, 650.

In re Debs, 158 *U. S.*, 564.

Gibbons vs. Ogden, 9 *Wheat.*, 1.

Lake Shore & Mich. Southern R. R. vs. Ohio, 173 *U. S.*, 285.

2. To trace historically the evolution of the doctrine in question:

See 2 Story Const., Chap. 18; 1 Kent's Com. * * * *pages 267 et seq.; and the portions of Elliott's Debates therein referred to; also United*

States vs. Kochersperger, No. 15,541, *Fed. Cases*, Vol. 26, p. 803; *and the various cases growing out of the abandonment of the Cumberland Road, particularly Scaright vs. Stokes*, 3 *How.*, 150 (1845); *Neil vs. Ohio*, 3 *How.*, 720; *Achison vs. Huddleson*, 12 *How.*, 293.

3. The old doctrine that federal sovereignty could only appropriate property within a State with the consent or acquiescence of the State, was forever dissipated by the invincible logic of Judge Cooley in *Trombley vs. Humphry*, 23 *Mich.*, **471, followed by his masterly work on** *Constitutional Limitations*, **both cited with approval by Mr. Justice Strong in** *Kohl vs. United States*, 91 *U. S.*, 367.

III.

WHEN THE HIGHWAYS OF A STATE ARE, BY ACT OF CONGRESS, ESTABLISHED POST-ROADS OF THE UNITED STATES, THEY BECOME PART OF THE POSTAL EQUIPMENT OF THE FEDERAL GOVERNMENT, AND SUBJECT TO THE PARAMOUNT AUTHORITY OF THE FEDERAL GOVERNMENT FOR POSTAL AND MILITARY PURPOSES.

1. In the Constitutional Convention, it was not once suggested by any member, however imbued with the doctrine of State sovereignty, that the Federal Government should not be granted the right to use the highways of a State for postal purposes. The only debate was as to the Feder-

al power to establish Federal post-roads independent of State highways (see 2 Story Const., 1 Kent's Com., above cited with references to Elliott's Debates).

2. Nor has the constitutionality of the Act of July 24, 1866, ever been questioned, except, perhaps, in dissenting opinions. It has uniformly been held that under this act, telegraph companies accepting its provisions have the right to occupy with their lines of telegraph the streets of a city and the roads of a State which by Act of Congress have been established post-roads of the United States.

Postal Tel. & Cable Co. vs. Oregon Short Line R. R. Co., 114 *Fed. Rep.*, 787.
W. U. Tel. Co. vs. Texas, 105 *U. S.*, 460.

"If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines (roads?), as we repeatedly have held it had, the State can have no authority to say it shall not be done."

Per MILLER, J., in *Western Union Tel. Co., vs. Massachusetts*, 125 *U. S.*, 554.

[N. B. If the highways, owned and operated by a State, are subject to the paramount authority of Congress for postal and military uses, could anything less be said of a highway, such as a turnpike, for instance, authorized by the State, but operated by a corporate agency created by the State?]

See, also,

West. Un. Tel. Co. vs. City of New York, 38 Fed. Rep., 552.
St. Louis vs. Western Union Tel. Co., 148 U. S., 92.
United States vs. Union Pac. Ry., 160 U. S., 1.
Postal Tel. Co. vs. Oregon Short Line R. R., 65 Pac. Rep., 735.
Hewett, et al., vs. Western Union Tel. Co., 4 Mackey, 424.

IV.

THE PRIMARY USE OF A HIGHWAY IS FOR THE PURPOSE OF TRAVEL, BUT THE OCCUPATION OF THE HIGHWAY BY TELEGRAPH LINES, IF SO MAINTAINED AND OPERATED AS NOT TO INTERFERE WITH THE PRIMARY USE, IS NOT ONLY PERMISSIBLE, BUT, THUS LIMITED, HAS BEEN HELD NOT TO CONSTITUTE AN ADDITIONAL SERVITUDE.

Julia Building Association vs. Bell Tel., 88 *Mo.*, 258.
Same Case, 57 *Amer. Rep.*, 398.
Cater vs. Northwestern Tel. Ex. Co., 60 *Minn.*, 593.
Same Case, 28 *L. R. A.*, 310.
Magee vs. Overshiner, 40 *L. R. A.*, 370.
People vs. Eaton, 100 *Mich.*, 208.
Same case, 24 *L. R. A.*, 721.
Pierce vs. Drew, 136 *Mass.*, 75.
Same Case, 49 *Amer. Rep.*, 7.
Hershfield vs. Rocky Mt. Bell Tel. Co., 2 *Mont.*, 103.

1. According to the reasoning in the foregoing cases, a highway is created not alone for the purpose of travel, but for commerce and the transmission of intelligence.

2. If the millions of messages flashed over the telegraph wires of the petitioner were conveyed by the slower process of carrier or stage coach, it would certainly add to the travel on the highways, and possibly constitute so great a burden as actually to congest and embarrass traffic thereon.

3. Therefore, the telegraph lines fulfill in large measure the primary uses of the highway; relieve the Postal Department of the United States of a great burden and expense; lighten the ordinary travel and traffic on the highway; and thus lessen the cost of its maintenance and repair.

This thought was quaintly put by the Court in *Magee vs. Overshiner (supra)*:

"We observe no means of distinguishing against the telephone equipment, *on the ground that its poles are not in motion as are ordinary instruments of travel.*"

4. And this enormous saving of expense, both to the State and Federal Governments, has the added advantage that the intercommunication of intelligence by telegraph is

accomplishd from minute to minute and with infinitely greater expedition than by carrier or conveyance.

5. Said Cadwalader, J., *U. S. vs. Kochersperger* (C. C. E. D. Penn., 1860), 26 Fed. Cas., 803:

"A post, etymologically defined, is a mode of conveying written or *unwritten* intelligence." According to this the telegraph is a "post."

V.

A RAILROAD IS A HIGHWAY, NOT SIMPLY *sub modo*, BUT INTRINSICALLY AND *per se*, IN THE SAME CATEGORY PRECISELY AS ROADS, STREETS, ALLEYS, TURNPIKES, PLANK ROADS, TRAMWAYS, BRIDGES, FERRIES, CANALS, AND NAVIGABLE RIVERS.

See the vigorous language of Mr. Justice STRONG in *Olcott vs. Supervisors*, 16 Wallace, 678, and the equally vigorous language of Mr. Justice BREWER *In re Debs*, 158 U. S., 564, and Monongahela N. Co. vs. U. S., 148 U. S., 312.

See, also,

Cherokee Nation vs. South. Kan. R. R., 135 U. S., 641-657.

L. S. & M. S. R. R. vs. Ohio, 173 *U. S.*, 285.

Smyth vs. Ames, 169 *U. S.*, 466.

Trunick vs. Smith, 63 Pa. St., 18.

California vs. Pacific R. R. Co., 127 U. S., 1, 39.

W. M. & P. R. R. vs. Jacobson, 179 U. S., 287 (pp. 296, 297).

Railroad Company vs. County of Otoe, 83 U. S., 667 (p. 673).

L. & N. R. R. Co. vs. Kentucky, 161 U. S., 696.

Mich. Tel. Co. vs. City of Charlotte, 93 Fed., 11.

And taxes may be imposed for their construction and maintenance.

Railroad Company vs. County of Otoe, 83 U. S., 667.

Town of Queensbury vs. Culver, 86 U. S., 91.

People vs. Flagg, 46 N. Y., 401.

1. Highways are, of course, differentiated as to the manner of use. It would not be possible, for instance, for the public to use a canal or ferry in the same manner that it uses a turnpike or a bridge. But the primary purpose of every highway is pulic travel, traffic, commerce, communication.

2. But the *manner* of use within the range of physical possibility is for the Legislature to determine.

3. The idea that the right of way of a railroad company is private property, and that as such the railroad company may use, or permit others to use it in such manner as the railroad company itself may elect, is a new idea, growing out of the stupendous material interests controlled by railroad companies, and because the powers thus assumed have fre-

quently been exercised with no more than a protest from the public. As a matter of law, such powers do not exist.

4. It is because railroads are highways that Congress is empowered to establish them as post and military roads of the United States.

5. It is because railroads are highways that State and municipal governments have been permitted to contribute out of the public treasury for their construction and maintenance.

6. It is because railroads are highways that the Congress of the United States has lavished upon many of the railroads of this country subsidies and land grants beyond all precedent in the history of the world.

7. It is because railroads are highways that the people of a community have been taxed to construct and maintain them not only, but that Legislatures have remitted taxes or agreed in some instances that they should be exempt from taxation.

8. It is because railroads are highways that the Supreme Court of the United States has declared the unlawful obstruction of such highways to be a public nuisance.

9. It would be extraordinary if railroad companies could enforce, through the Courts of Justice, public contributions to their maintenance on the ground that they were highways; that they could successfully plead the validity of a statute exempting them from taxation on the ground that they were highways; that they could invoke the power of the Federal Government through its Courts to protect them from the lawless acts of a mob on the ground that they were highways, and as such illegally obstructed—in short, that they were highways for any and every purpose where it would subserve their interests to be such, but that they were only highways sub modo, or so-called, when declared by Congress to be post and military roads of the United States.

VI.

THE POWER OF CONGRESS TO ESTABLISH THE RAILROADS OF THE UNITED STATES AS MILITARY AND POST ROADS IS NOT A DORMANT POWER, BUT HAS BEEN ASSERTED AND ENFORCED BY THE FEDERAL GOVERNMENT FROM THE DAY THE FIRST RAILROAD COMPANY WAS CHARTERED.

1. Congress never passed an act, donating public lands or the proceeds from the sale thereof to the encouragement of railroad enterprise,

that it did not specifically declare that the railroad receiving the benefit of the donation was to be a post and military road of the United States.

2. Congress never chartered the construction of a railroad bridge across a navigable stream that it did not specifically declare such bridge to be a post and military road of the United States.

In numerous instances Congress has not only provided that the bridge, whose construction was authorized, should be a post and military road, but that the United States should have the right of way for postal telegraph purposes across such bridge. See, for example, various bridge acts set forth in Statutes at Large, Vol. 17 pp. 99, 120, 160, 379.

3. By Act of Congress, July 7, 1838, entitled "An Act to establish certain post routes and to discontinue others," it was provided (Sec. 2): **"And be it further enacted that each and every railroad within the limits of the United States, which is or hereafter may be made and completed, shall be a post route, and the Postmaster-General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than 25 per centum over and above what similar transportation would cost in post**

coaches" (U. S. Stat. at Large, Vol. 5, page 283).

4. By Act of Congress, March 3, 1853, entitled, "An Act to establish certain post roads, and for other purposes it was declared as follows (Sec. 3): **"And be it further enacted that all railroads and parts of railroads, which are now and hereafter may be in operation, be, and the same are hereby, declared to be post-roads"** (U. S. Stat. at Large, Vol. 10, page 255).

5. By Act of Congress, January 31, 1862, entitled "An Act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes," it was provided (Sec. 1): **"That the President of the United States, when in his judgment the public safety may require it, be, and he is hereby authorized to take possession of any or all the railroad and telegraph lines in the United States, their offices and appurtenances," etc.** (U. S. Stat. at Large, Vol. 12, p. 334).

6. By Act of Congress, June 15th, 1866, entitled "An Act to facilitate commercial, postal and military communication among the several States," it was provided: "Whereas, the Constitution of the United States

confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post-roads, and to raise and support armies therein, be it enacted by the Senate and House of Representatives of the United States, in Congress assembled, that every railroad in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon its roads, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination" (U. S. Stat. at Large, Vol. 14, p. 66).

7. By Act of Congress, June 8, 1872, entitled "An Act to revise, consolidate and amend the statutes relating to the Post-Office Department," it was provided as follows: (Sec. 200): **"That all the waters of the United States shall be post-roads during the time the mail is carried thereon, as provided in Section 219.**

"Section 201. That all railways and parts of railways, which are now, or hereafter may be put in operation,

are hereby declared to be post-roads.

"Section 202. That all canals, during the time the mail is carried thereon, are hereby declared to be post-roads.

"Section 203. That all plank roads, during the time the mail is carried thereon, are hereby declared to be post-roads.

"Section 205. That all letter carrier routes, established in any city or town for the collection and delivery of mail matter by carriers, are hereby declared to be post-roads

(U. S. Stat. at Large, Vol. 17, pp. 308, 309).

N. B. In the case of such highways as the waters of the United States, canals and plank roads, Congress, in the foregoing acts, declares them to be post-roads "during the time the mail is carried thereon." Is not the omission of this qualification in the case of railroads somewhat significant?

VII.

BY THE ACT OF JULY 24, 1866, AND CORRELATED ACTS, CONGRESS DECLARED A POLICY AND A PURPOSE, THAT TO ENCOURAGE AND FACILITATE INTERCOMMUNICATION AMONG THE PEOPLE, THE COMPANIES OPERATING THE RAILROADS AND TELEGRAPHS OF THE UNITED STATES SHOULD BE MUTUALLY ACCOMMODATING AND CO-OPERATIVE, AND SHOULD, SO FAR AS PRAC-

TICABLE, CONSTRUCT THEIR LINES OF RAILROAD AND TELEGRAPH ALONG THE SAME RIGHTS-OF-WAY. THIS POLICY IS NOT ONLY MANIFEST FROM THE TITLE AND CONTEXT OF THE ACT OF JULY 24, 1866, BUT FROM THE HISTORY OF THE ACT AND THE DEBATES IN CONGRESS PRIOR TO ITS PASSAGE. THIS POLICY OF THE FEDERAL GOVERNMENT HAS BEEN DISCOVERED AND DECLARED BY THE COURTS, AND NUMEROUS STATES HAVE EXTENDED THE POLICY BY LEGISLATIVE ENACTMENT TO INCLUDE THE TELEPHONE. NOT ONLY SO, BUT THROUGH THE DICTATES OF SELF-INTEREST AND MUTUAL ACCOMMODATION, RAILROAD AND TELEGRAPH COMPANIES, FROM THE EARLIEST TIMES, HAVE UNDER CONTRACT AND AGREEMENT, OPERATED SIDE BY SIDE, SO THAT TO-DAY THERE IS NOT, NOR HAS THERE EVER BEEN, A RAILROAD IN THE UNITED STATES, OVER AND ALONG WHICH TELEGRAPH LINES HAVE NOT BEEN CONSTRUCTED, MAINTAINED AND OPERATED.

1. The title of the act of July 24, 1866, is as follows: "An act to *aid* in the construction of Telegraph Lines, and to *secure* to the Government the use of the same for postal, military and other purposes." The principal, and, indeed, the only valuable "aid" afforded by the act is the grant of a right to go along and over the post and military roads of the United States. If this grant is nugatory—if in affecting to make it Congress transcended its constitutional powers—then there is no aid or encouragement given by the act to telegraph companies of any material consequence, nor any adequate in-

ducement held out to telegraph companies to accept the burdens, restriction and obligations imposed by the act.

2. Under the act, Congress expected to "secure" to the Government the use of these telegraph lines for postal, military and other purposes after they were constructed, by requiring priority of service on behalf of the Government and its officers and by exacting an option for the purchase of the entire telegraphic properties at an appraised valuation. If the lines, when constructed, were liable to destruction at the caprice of a railroad company, and at the termination of a leasehold tenure, however short, the security of telegraphic service, contemplated by the statute, would be more apparent than real.

3. The act had its genesis in the suggestion that the Federal Government construct and own its own telegraph lines. The condition of the country so soon after the War of the Rebellion, as well as a knowledge of the needs of the country begotten by that War, would have amply justified the Government in undertaking the experiment suggested.

4. But while the suggestion of Government ownership eventuated in

the statute as it appears, it was evident from the debates in Congress that the grant of powers to the telegraph companies which might be induced to accept the restrictions, burdens and obligations of the act, were as full and plenary as the Federal Government under the Constitution could bestow.

5. And the statesmanship manifested by the act has been justified by the event, for telegraphic rates to the general public have been reduced ninety per cent., and the use of the telegraph as a means of intercommunication (including private wires, railroad despatches, government messages, etc.), has increased, perhaps, a thousand fold.

6. The public policy created by the act, and as above outlined, has been discovered and declared, not only by the Supreme Court of the United States, but by numerous other tribunals.

See Congressional Globe, Part IV., First Session 39th Congress, pages 3480-3490:

W. U. Tel. Co. vs. Massachusetts, 125 U. S., 530.

United States vs. Union Pac. Ry. Co., 160 U. S., 1, 41, 44, 49.

Tel. Co. vs. Texas, 105 U. S., 460.

Postal Tel.-Cable Co. vs. Oregon Sht. Line, 114 Fed., 787.

Postal Tel.-Cable Co. vs. Southern Ry. Co., 89 Fed., 190.

Postal Tel.-Cable Co. vs. Oregon Sht. Line, 65 Pac. Rep., 735.

West. Un. Tel. Co. vs. B. & S. W. Ry. Co., 3 McCrary, 130.

West. Un. Tel. Co. vs. B. & O. Tel. Co., 19 Fed., 660.

Southern Bell Tel. Co. vs. Richmond, 78 Fed., 858.

7. Not only so, but the statutes of many States extend the right to occupy the highways of the State, including the highways called railroads, to telephone companies—the Supreme Court of the United States having limited the application of the Act of July 24, 1866, to telegraph companies proper.

ALABAMA:

New Orleans, M. & T. R. R. Co. vs. S. & A. T. Co., 53 Ala., 211.

COLORADO:

Union Pac. R. Co. vs. Colo. Postal Tel. Cable Co., 69 Pac., 564.

GEORGIA:

S. F. & W. Ry. Co. vs. Postal Tel. Co., 38 S. E. Rep., 353.

IDAHO:

Postal Tel. Co. vs. O. St. Line Ry. Co., 104 Fed., 623.

ILLINOIS:

St. L. & C. R. R. Co. vs. Postal Tel. Co., 173 Ill., 508.

KENTUCKY:

Postal Tel Co. vs. Mobile & O. R. Co., 54 S. W. Rep., 727.

LOUISIANA:

Postal Tel. Co. vs. M., L. & T. R. R. & S. S. Co., 21 So. Rep., 183.

MISSISSIPPI:

Mobile & O. R. Co. vs. Postal Tel. Co., 26 So. Rep., 370.

NORTH CAROLINA:

Phillips vs. Postal Tel. Co., 41 S. E. Rep., 1022.

TENNESSEE:

Mobile & O. Ry. Co. vs. Postal Tel. Co., 41 L. R. A., 403.

TEXAS:

T. & N. O. Ry. Co. vs. Postal Tel. Co., 52 S. W. Rep., 108.

VIRGINIA:

Postal Tel. Co. vs. Farmville & P. R. Co., 32 S. E. Rep., 468.

UTAH:

Postal Tel. Co. vs. Or. Sht. Line, 65 Pac. Rep., 735.

OHIO:

Rev. St., Sec. 3454, *et seq.*

8. In the case at bar, it is not proposed by the defendant railroad company to relieve its right of way of all telegraph lines, but it is proposed to substitute for the lines of the petitioner the lines of a rival company, the effect being

(whatever the motive) to destroy, as far as may be, one telegraph company and build up and establish, as far as may be, a rival company. It is hardly necessary to observe that Congress did not contemplate reposing such a providential power in any corporation operating one of the post-roads of the United States.

VIII.

BY ACT OF CONGRESS, JULY 24, 1866, THE WESTERN UNION TELEGRAPH COMPANY, HAVING ACCEPTED THE PROVISIONS OF SAID ACT, WAS IN EXPRESS TERMS GRANTED, AMONG OTHER THINGS, "THE RIGHT TO CONSTRUCT, MAINTAIN AND OPERATE LINES OF TELEGRAPH OVER AND ALONG" THE RAILROADS OF THE DEFENDANT RAILROAD COMPANY, PROVIDED ONLY THAT ITS LINES OF TELEGRAPH BE SO CONSTRUCTED AND MAINTAINED AS NOT TO INTERFERE WITH THE ORDINARY TRAVEL ON SUCH RAILROADS.

1. It is true that neither the Western Union Telegraph Company nor the Pennsylvania Railroad Company was specifically named in the grant, the actual language of the grant being as follows:

"That any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph * * * over and along ary of the military

or post-roads of the United States, which have been or may hereafter be declared such by act of Congress * * * provided that such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post-roads."

The substitution of the names of the parties to this suit, both being within the purview of the act, reduces the language of the grant to a concrete expression.

2. Thus read, the act is obviously, and with no room for interpretation, simply the regulation of the use of the right of way of the Penn. R. R. Co. by the sovereign power within the limitations and for the purposes designated in the act, and the only question to determine is whether Congress has transcended its constitutional powers.

3. It should be noted that, while the act in question grants to the Western Union Telegraph Company certain other rights of more or less consequence, the only provisions of the grant invoked by the petitioner, or involved in this case, are in the words above set forth.

IX.

THE RIGHT GRANTED TO THE WESTERN UNION TELEGRAPH COMPANY BY THE ACT OF CONGRESS JULY 24, 1866, IS SIMPLY OF AN EASEMENT OF USE, IN AN EASEMENT, YIELDING AT ALL TIMES TO THE NECESSITIES OF THE PARAMOUNT USE, AND LIMITED AT ALL TIMES TO THE NON-INTERFERENCE WITH THE PRIMARY USES OF THE RAILROAD COMPANY.

1. It will be observed that after the words creating the right here insisted upon, the proviso of the act proceeds to define specifically the actual right created and its limitations.

2. The language of the proviso is, "That such lines of telegraph shall be so constructed *and maintained* **as not to interfere with the ordinary travel," etc. Hence, the original construction of the telegraph lines not only,** *but the subsequent maintenance of those lines,* **must not interfere with the ordinary operations of the railroad upon which they are located.**

3. This proviso can only mean that if, owing to the development and enlargement of travel after the construction of the telegraph lines, the maintenance of such lines shall interfere with the operations of the road, then such lines must be reconstructed or altogether removed, as circumstances may require.

4. It would hardly be possible to create by contract or covenant a better defined obligation on the part of the telegraph company, occupying a railroad right-of-way under the provisions of this act, to remove or transplant its lines of telegraph whenever necessary to accommodate the convenience and requirements of the railroad company.

5. THE PETITIONER IN THIS CASE SEEKS ONLY TO ESTABLISH ITS RIGHT AS THUS LIMITED AND DEFINED.

6. And to show to the Court that such is its understanding of its rights, and to make assurance doubly sure, it proposes in its petition that the judgment finally to be entered shall not only define its rights as above indicated, but shall incorporate its stipulation and agreement to that effect. That such a course is not unusual, see following cases:

St. L. & C. R. R. Co. vs. Postal Tel. Co., 173 Ill., 508-575.

Mobile & O. R. Co. vs. Postal Tel. Co., 41 L. R. A., 403-406.

M. & O. R. Co. vs. Postal Tel. Co., 26 S. Rep., 370-374.

Postal Tel. Co. vs. Or. Sht. Line Co., 65 Pac. R., 735-736.

X.

WHETHER CONGRESS, UNDER ITS CONSTITUTIONAL POWERS OVER THE HIGHWAYS OF THE NATION, AS MILITARY AND POST ROADS, MAY APPROPRIATE THE USE OF SUCH POST ROADS FOR THE CONSTRUCTION AND OPERATION OF POSTAL TELEGRAPH LINES OWNED BY IT, OR BY ONE OF ITS AGENCIES, SO LONG AS THE SAME SHALL NOT INTERFERE WITH THE ORDINARY TRAVEL ON SUCH MILITARY AND POST ROADS, *without making compensation*, EITHER TO THE OWNERS OF THE POST ROADS OR TO THE OWNERS OF REVERSIONARY INTERESTS THEREIN, QUAERE?

Pittsburgh & W. E. Pass. R. vs. Point Bridge Co., 165 Pa. St., 37; s. c., 30 Atlantic Rep., 511.

Stockton vs. B. & N. Y. R. R. Co., 32 Fed., 9.

Scranton vs. Wheeler, 57 *Fed.*, 803; s. c., 179 U. S., 141, and authorities cited.

Hawkins Point Light House Case, 39 Fed., 77; s. c., 155 U. S., 102.

Gibson vs. United States, 166 U. S., 269.

Hewett vs. W. U. Tel. Co. & Dist. Columbia, 4 Mackey, 424.

Monongahela Nav. Co. vs. United States, 148 U. S., 312, the Opinion of Justice BREWER, p. 324.

Hill vs. United States, 149 U. S., 593.

1. The answer to the above query depends upon whether the use made of such military and post-roads, without interference with the primary use of such roads, constitutes a

"taking" within the constitutional inhibition against "taking private property without just compensation."

2. In this connection two facts should be specially noticed:

First. That the property designated in the act is not "private" property, strictly speaking, but public property—a public highway. It is property to construct which the citizen may have been taxed; it is property which, if the Legislature so elect, could be exempt from taxation as public property; it is property condemned to the use of the public and the Government by soveign predominance.

Second. The use contemplated is conditioned upon non-interference with the primary use—to wit.: the ordinary travel on said roads.

Would the use of such property, thus limited, constitute a "taking" within the constitutional inhibition?

3. It is true that a telegraph pole planted in the ground is for the time an exclusive use of the space so occupied, but it is equally true that this use is not necessarily a permanent one. Whether the pole shall be permitted to remain in its original location must depend upon whether its

maintenance there would interfere with ordinary travel as it might be developed on the particular post-road. If it did so interfere, then the telegraph company would be under obligations, by the very terms of its grant, to remove such pole to another location.

XI.

IF A TELEGRAPH COMPANY, ACCEPTING THE OBLIGATIONS OF THE ACT OF CONGRESS, JULY 24, 1866, IN ATTEMPTING TO AVAIL ITSELF OF THE RIGHTS AND PRIVILEGES GRANTED IT BY SAID ACT IN PUBLIC AND QUASI-PUBLIC PROPERTY (TO WIT, THE MILITARY AND POST-ROADS OF THE U. S.), FINDS IT NECESSARY TO APPROPRIATE TO ITS USE PRIVATE PROPERTY INVOLVED WITH THE PUBLIC AND QUASI-PUBLIC PROPERTY, WILL THE GRANT MADE BY CONGRESS BE DECLARED VOID AS TRANSCENDING THE CONSTITUTIONAL POWERS OF CONGRESS, OR WILL THE CONSTITUTION ITSELF BE READ INTO THE ACT AND THE ACT INTERPRETED IN CONNECTION THEREWITH?

1. This question assumes that in availing itself of the rights granted it by the Act of Congress, July 24, 1866, to occupy the postroads of the United States, a telegraph company appropriates to some extent the use of private property incidentally involved with such post-roads, such, for instance, as the reversionary interest of a contiguous owner, or

private property the railroad company itself may have in its right of way.

2. It will be observed that the Act of Congress does not, in terms, require compensation to be made for the use of the property designated; neither is there any machinery provided by the act to ascertain the amount of any compensation to which the owners of private interests affected might be entitled.

3. Is the act, therefore, void as an attempt on the part of Congress to transfer private property from one individual to another private individual, or from one quasi-public corporation to another quasi-public corporation without just compensation being paid therefor? Note well! The act does not declare that compensation shall not be paid.

XII.

RATHER THAN THAT A STATUTE SHOULD FAIL OF ITS PURPOSE OR BE NULLIFIED BY THE COURTS AS UNCONSTITUTIONAL, THE COURTS WILL READ INTO THE STATUTE THE CONSTITUTIONAL INHIBITION AGAINST THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION, AND WILL PROVIDE THE COURT MACHINERY NECESSARY TO DETERMINE JUDICIALLY THE AMOUNT OF JUST COMPENSATION TO BE PAID THEREFOR.

1. The Courts will do this for the following reasons:

First. "If the implication in favor of the intended exercise of the power is very strong —*for example, that the grant itself would be defeated if the company were not allowed to condemn* —the right to condemn may be exercised on the theory that an implied right has been granted" (Amer. & Eng. Enc. of Law, Vol. 10, p. 1054; quoted with approval by his Honor Judge BUFFINGTON; see Opinion, Record, p.).

Second. "It is a cardinal rule that all statutes are to be so construed as to sustain, rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless; *ut res magis valeat, quam pereat.* Whenever an act can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, this will be done" (Sutherland on Statutory Construction, Section 332).

Third. "When the use is granted, everything is granted by which the grantee may have and enjoy the use;" or, as stated in "Broom's Maxims": "*Les est cuicunque, aliquis, quod concedit, concedere videtur et id sine quo res ipsa non potuit*" (quoted by Justice BALDWIN in *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420-630).

Fourth. "Whenever anything is authorized to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment" (*Fenton vs. Hampdon*, 11 Moore's P. C., 360).

See also *Sutherland's Statutory Construction*, §§295, 324, 332, 340, 341, 343, 344, 379, 382, 388.

Fifth. The constitutional inhibition against taking private property without just compensation, being negative, is self-executing, and is to be read into every law and statute where applicable.

In re Rughcimer, 36 Fed., 369.
Hickman vs. City of Kansas, 41 Am. St. Rep., 684, and note.
West Un. Tel. Co. vs. Williams, 8 L. R. A., 429.
Compare *Neal vs. Delaware*, 103 *U. S.*, 370; *East St. Louis vs. Amy*, 120 *id.* 600.
Kentucky Railroad Tax Cases, 115 *U. S.*, 321, 334.

Sixth. Where a right is given by law or statute, and no special machinery is provided for the enforcement of the law, the Courts will supply the machinery, either by adopting the machinery already in use or the machinery in vogue at common law, which, in cases of condemnation, was the writ ad quod damnum. The writ of ad quod damnum simply means that the amount of compensation to be paid to an owner for the appropriation of his private property to a public use shall be determined by a full jury.

Kohl vs. United States, 91 U. S., 367.
Unites States vs. Jones 109 U. S., 513.
High Bridge Co. vs. United States, 69 Fed., 320.

Dashiell vs. Grosvenor, 66 *Id.,* 338.
City of New York vs. Pine, 185 U. S., 93.
Osborne vs. Mo. Pac. Ry. Co., 147 U. S., 248.
McElroy vs. Kansas City, 21 Fed. Rep., 357.
United States vs. Great Falls Mfg. Co., 112 U. S., 645.

As to the writ *ad quod damnum,* see:

2 Lewis Em. Dom., Sec. 402.
Scudder vs. T. D. F. Co., 1 Sax. Ch. (N. J.), 694.
Hooker vs. New Haven & N. Co., 14 Conn., 146.
Jerome vs. Ross, 7 Johns. Ch., 315.
Wheelock vs. Young, 4 Wend., 650.
Stevens vs. The Proprs. of Middlesex County, 12 Mass., 466.
Bloodgood vs. M. & H. R. R. Co., 18 *Wend.,* 9.
Beekman vs. S. & S. R. R. Co., 3 *Paige Ch.,* 45.

NOTE: In *Upshur County vs. Rich,* 135 U. S., 467-476, commenting on the case of *Kohl vs. United States, supra,* it was said that the mode of procedure in this case was analogous to the proceeding of *ad quod damnum* at common law.

XIII.

THE ACT OF JULY 24, 1866, NECESSARILY IMPLIES THAT THE BENEFICIARY, UNDER THE ACT, IS VESTED WITH THE POWER OF EMINENT DOMAIN IF, TO AVAIL ITSELF OF THE RIGHTS GRANTED, PRIVATE PROPERTY, INCIDENTALLY INVOLVED WITH THE SPECIFIC PROPERTY APPROPRIATED TO ITS USE, IS ALSO APPROPRIATED BY IT; OTHERWISE THE GRANT WOULD FAIL.

1. The right of eminent domain is implied whenever the grant itself would be defeated if the company was not allowed to condemn. This proposition is conceded by the trial Judge (see Opinion, Record, p.).

2. The legislative grant to a corporation of the right to *own and hold* land would not, of course, imply a right to condemn, for the grant would simply create a *capacity* in the corporation to own and hold land, *however acquired.* Hence, the case of *Murphy vs. Kingston, etc., R. R.*, 11 Ontario Rep., 582, cited by the trial judge, is not in point.

3. The right of a corporation vested with the *general* power of eminent domain, to appropriate to its use the property of a corporation *already dedicated to a public use*, is not ordinarily permitted *unless the existence of certain physical facts makes such appropriation necessary in order that the subsequent grant shall stand. In such case it is not the power but the exemption that is implied.* This principle has no relevancy to the present controversy, and the cases cited by the trial Court, in illustration of the principle, are therefore not in point.

4. The Act of July 24, 1866, does not purport to create in the telegraph company accepting its terms a mere capacity to own and hold lands; nor does the implication of a right of eminent domain arise out of physical and extrinsic facts.

5. THE IMPLICATION OF THE RIGHT OF EMINENT DOMAIN ARISES OUT OF THE VERY LANGUAGE OF THE GRANT, AND SUCH POWER MUST BE IMPLIED TO GIVE EFFECT TO THE GRANT, OR THE GRANT ITSELF MUST FAIL.

6. Congress, by the act in question, affects to create in the petitioner a right of user in the defendant's railroad, but says nothing about compensation. Except for the constitutional inhibition against taking property without just compensation, the petitioner could enter upon the enjoyment of the use without the tender or payment of any consideration; and if the right created by the Act of Congress shall not be deemed a "taking" within the meaning of the Constitution, the petitioner, notwithstanding the Fifth Amendment, would have the right to enter.

7. IT IS THE CONSTITUTION ALONE THAT WOULD BAR PETITIONER FROM THE USE AUTHORIZED, AND THE QUESTION, THEREFORE, REPEATS ITSELF: IS THE ACT, AUTHORIZING THE USE, TO FAIL? OR IS IT TO BE READ IN CONNECTION WITH, AND IN SUBORDINATION TO, THE CONSTITUTION, AND THE RIGHTS CREATED BY IT ENFORCED UPON THE PAYMENT OF A JUST COMPENSATION?

XIV.

NO CASE INVOLVING THE PRINCIPAL ISSUE HERE IN CONTROVERSY HAS EVER BEEN PRESENTED TO THE SUPREME COURT OF THE UNITED STATES FOR ADJUDICATION. THE LANGUAGE OF CHIEF-JUSTICE WAITE IN THE PENSACOLA CASE, REITERATED BY CHIEF-JUSTICE FULLER IN THE ANN ARBOR CASE, ASSUMED BY COUNSEL FOR DEFENDANT AND BY THE TRIAL COURT AS CONCLUDING THE PETITIONER ON THE PRINCIPAL POINT HERE INVOLVED, IS NOT ONLY CLEARLY OBITER, BUT BY NO MEANS JUSTIFIES THE SIGNIFICANCE ATTRIBUTED TO IT.

1. Whether a telegraph company that had accepted the conditions of the Act of Congress, July 24, 1866, could appropriate private property, was not in issue in either the *Pensacola Case* (96 U. S., 1), or the *Ann Arbor Case* (178 U. S., 239), and all that is said therein, as to the scope of the act beyond the points directly in issue, is clearly *obiter*.

2. If the meaning of such obiter dicta is as contended for by counsel for the defendant, and the Trial Court, then it is inconsistent with other statements made by the very Justices rendering these opinions, and diametrically opposed to the ruling of the Supreme Court of the United States in other cases.

3. If properly apprehended and fairly construed, the *dicta* in these two cases do not admit the construction placed upon them by counsel for defendant and the Trial Court.

XV.

WHILE THE PRINCIPAL ISSUE IN THIS CASE HAS NEVER BEEN PRESENTED TO THE SUPERME COURT OF THE UNITED STATES, LESSER COURTS HAVE SEVERAL TIMES PASSED UPON IT, AND, WITH ONE EXCEPTION, HAVE CONSTRUED THE ACT OF CONGRESS, JULY 24, 1866, ACCORDING TO THE PRINCIPLES CONTENDED FOR BY THE PETITIONER IN ERROR.

Postal Tel.-Cable Co. vs. Oregon Short Line, 114 *Fed.*, 787.

Postal Tel.-Cable Co. vs. Southern R. R. Co., 89 Fed. Rep., 190.

Postal Tel.-Cable Co. vs. Oregon Short Line, 65 Pac. Rep., 735.

St. P., M. & M. R. R. Co. vs. W. U. Tel. Co. (C. C. A.), 118 Fed., 497.

Cf. St. Louis vs. W. U. Tel. Co., 148 U. S., 92.

United States vs. Union Pac. Ry. Co., 160 U. S., 1-41.

Southern Bell Telephone Co. vs. Richmond, 78 Fed., 858.

Union Trust Co. vs. A., T. & S. F. R. R. Co. (New Mexico), 43 Pac. Rep., 701.

Mercantile Trust Co. vs. Atlantic & Pac. R. R. Co., 63 Fed., 513.

W. U. Tel. Co. vs. Los Angeles Electric Co., 76 Fed., 178.

Contra, Postal Telegraph-Cable Co. vs. C., C., C. & St. L. R. R. Co., 94 Fed. Rep., 234.

PETITIONER'S RIGHTS AS LESSEE OF THE PROPERTY AND FRANCHISES OF THE ATLANTIC AND OHIO TELEGRAPH COMPANY.

I.

THE ATLANTIC AND OHIO TELEGRAPH COMPANY WAS AUTHORIZED BY ITS CHARTER TO APPROPRIATE TO ITS USE, WITHIN SPECIFIED LIMITATIONS, PROPERTY OF A SPECIFIC CHARACTER, TO WIT, THE ROADS, HIGHWAYS, STREETS AND WATERS OF THE STATE OF PENNSYLVANIA. DEFENDANT'S RAILROAD IS NOT ONLY A HIGHWAY OF THE STATE IN ITS VERY NATURE, BUT BY ITS CHARTER AND THE CONSTITUTION OF PENNSYLVANIA IS EXPRESSLY DECLARED TO BE A HIGHWAY. HENCE, IT IS SUBJECT TO THE APPROPRIATION OF THE ATLANTIC AND OHIO TELEGRAPH COMPANY, WITHIN THE LIMITATIONS OF THE RIGHT GRANTED.

1. The charter of the Atlantic and Ohio Telegraph Company (Section 5) gave the right to that company to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within the State of Pennsylvania, the said works to be so placed as *not to interfere with the common use* of such roads, highways, streets and waters. And the said corporation, *and all other persons by them authorized*, appointed or employed were given the power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing its telegraph lines, and using, repairing, maintaining and enjoying the same, * * * provided that compensation previous thereto shall be made, secured and

tendered to the owner or owners of any land, as shall be agreed upon between the parties or in such manner as in the act mentioned (Record, pp. 22, 23; Exhibit 1).

2. Section 1, Article 17, of the Constitution of Pennsylvania provides:

"*All railroads and canals shall be public highways.*"

3. Section 12, Article 16, of the Constitution of Pennsylvania provides:

"Any association or corporation, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

4. Section 3, Article 16, of the Constitution of Pennsylvania provides:

"The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals."

5. Clause 1, Section 33, Chapter 6, of the Act of the Pennsylvania Legislature of April 29th, 1874, provides:

"Such corporation (telegraph) *shall be authorized*, when incorporated as hereinbefore provided, *to construct lines of telegraph along and upon any of the public roads, streets, lands or highways*, or across any of the waters within the limits of this State, by the erection of the necessary fixtures,"

etc., * * * "but the same shall *not be so constructed as to incommode the public use* of said roads, streets, or highways."

Clause 2 of the foregoing act provides:

"In all cases where the parties cannot agree upon the amount of damages claimed, or, by reason of the absence of legal capacity of the owner or owners, no such agreement can be made for the right to enter upon lands or premises for the purpose named in this section, the company shall tender a bond, or have the same filed in the manner provided in the forty-first section of this act, and proceedings shall be had as therein set forth."

6. In the case of People's T. & T. Co. vs. Burkes & D. T. Road, 199 Pa. St., 411; s. c., 49 Atl. Rep., 284, it was held that, because a turnpike was a highway in its very nature, and because a telephone or telegraph company had a right to occupy the highways of the State, therefore, the telephone or telegraph company could appropriate to its use the turnpike highway, within the limitations aforesaid. See, also, P. & W. E. P. Ry. Co. vs. Point Bridge Co., 165 Pa. S., 37; s. c., 30 Atl. R., 511.

It will be observed that neither Section 1, Article 17, of the Constitution of Pennsylvania, nor any other section nor article of that instrument, specifically declares a turnpike or a bridge to be a highway. *The Constitution does declare, however, that railroads shall be public highways.* If, therefore, a turnpike can be sub-

jected to the use of a telephone or telegraph company, *because it is a highway in its very nature, a fortiori, is a railroad subject to such use to the extent provided in the Act of Congress of July 24, 1866, being not only a highway per se, but expressly declared such by the Consitution of the State. Morever, the defendant's railroad is a highway by the very terms of its charter.*

Trunick vs. Smith, 63 Pa. S., 18.

II.

AS LESSEE OF THE FRANCHISES OF THE ATLANTIC AND OHIO TELEGRAPH COMPANY, THE WESTERN UNION TELEGRAPH COMPANY HAS THE RIGHT IN ITS OWN NAME TO EXERCISE SUCH FRANCHISES, INCLUDING THE FRANCHISE OF EMINENT DOMAIN.

1. This was practically conceded by the trial judge, who held, however, that the Atlantic and Ohio Telegraph Company was not authorized under its charter to appropriate to its use a railroad right of way, even within the limitations imposed—to wit, that the use should not interfere with the common use of such highway, or incommode the public use thereof.

2. Not only would the Western Union Telegraph Company have the right to condemn in its own name, under the express terms of the Atlantic and Ohio charter already quoted, but it would have the right under the general principles and policy of law, which justifies the condemnation only upon the theory that *the property when condemned is for the use of the public, by whomsoever condemned*, and that "the *delectus per-*

sonarum is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred" (per HOLMES, J., in *Abbott vs. New York and New England R. R. Co.* [Mass.], 15 N. E. Rep., 91).

See, also,

California Central Railway Co. vs. Hooper, et al., 76 *Cal.*, 404.

Crolley vs. Minneapolis & St. Louis R. R. Co., 30 Minn., 541.

C. & W. I. R. R. Co. vs. I. C. R. R. Co., 113 Ill., 156.

Kip vs. N. Y. & Harlem R. R. Co., 6 Hun, 24; s. c., 67 N. Y., 227.

Argument.

The Act of Congress, July 24th, 1866, *offers inducements to the telegraph company*, created by any State of the Union, to accept the burdens, restrictions and obligations imposed by the act. *It was meant to be a distinct temptation*, and it was hoped by the Government that every telegraph company with ambitious designs would yield to it.

The burdens and obligations imposed by this act, and subsequent acts, are not merely nominal. *They constitute the consideration moving to the Government for the rights granted by the act.* They require, in the first place, that the entire machinery of the telegraph company shall be devoted primarily to the Government service in all its departments, and to whatever extent the Government and its officials may require. One of the statutes denounces penalties against any telegraph company

which may neglect or refuse to perform such service. Moreover, the Government becomes the potential owner of all the property and effects of every telegraph company accepting the provisions of the act, by exacting an option for the purchase of such telegraph property and effects at an appraised valuation. And the service to be performed for the Government is at a price arbitrarily fixed by the Postmaster-General, which price, we take it, may be anything this side of confiscation.

The petitioner in this case avers, under oath, that the Western Union Telegraph Company, as early as 1867, accepted the burdens and obligations imposed by the act, and has ever since performed, and is now performing for the Government, all the services required by the act. It is here asking, in effect, that the Government, on its part, shall perform its contract, and make good its promises.

If the United States has an actual property interest in the *mail matter*, entrusted to it simply for delivery (see Debs Case, 158 U. S., 564), will it be contended that it has no property interest in the telegraph lines of the petitioner company, the services of which are at its primary disposal, and from which it holds, and has held since 1867, an optional contract of purchase?

But whatever occasion may hereafter arise for the Government itself to protect the telegraphic property at stake, *we assert, as our first proposition, that the Western Union Telegraph Company is entitled to insist that the rights granted it by the Federal Government shall be enforced to the full extent that the Congress of the United States had power to make them.*

What, then, were the rights and privileges granted the Western Union Telegraph Company by the Congress of the United States?

There is only one right of particular value, or that would constitute a distinct inducement, much less temptation, to any telegraph company to accept the provisions of the act. This will more fully appear if we catalogue the rights granted by the act.

The act says (Section 1, St. at L., Vol. 14, p. 221):

"Any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union shall have the right

1. "To construct, maintain and operate lines of telegraph through and over *any portion of the public domain of the United States.*

2. *"Over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress.*

3. "And over, under or across the navigable *streams or waters of the United States."*

But the rights above granted are expressly limited by the *proviso*, which declares that such lines of telegraph shall be so constructed and maintained "as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military and post-roads."

4. As a sort of addendum to the foregoing grants, and as a secondary inducement, the act further provides:

"And any of such companies shall have the right to take and use from such public lands, the necessary stone, timber and other material for its posts, piers, stations, and other needful uses, and—

5. "May pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its said lines of telegraph may be

located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

These are all the rights granted by the Act. And yet it is sought to limit the rights granted altogether to the use of the public domain—*meaning the unappropriated lands of the United States*—and to any post-roads that may be established over such public domain, or built and owned by the Federal Government for its exclusive use. Thus amended, the act would purport to grant, *not* a right to build telegraph lines over and along *all* the military and post-roads of the United States, WHICH CONGRESS MIGHT AT ANY TIME DECLARE TO BE SUCH, but the right only to construct telegraph lines over and along such military and post-roads *as the Government might own in its own right*, and for its exclusive use, unembarrassed by State authority or the right of user by the public generally. In other words, the right granted would be simply a right of way over the public domain—a snake track in the desert. It is enough to say that a right, thus limited, would offer no inducement whatever to a telegraph company to accept the burdens, obligations and restrictions which accompany it.

The telegraph company, accepting the provisions of the act would not be expected so to interpret its rights. *The company would have the right to rely upon the plain and perfectly comprehensible language of the act;* it would be a fraud on a telegraph company, accepting the offer of Congress *and relying upon the unambiguous language of that offer*, if the rights which it believed it was acquiring, *and which were within the constitutional powers of*

Congress to give, were whittled away and minimized by artificial construction.

If Congress had no constitutional power to make the grant to the full extent plainly indicated by its own language, and it became necessary, in order to maintain the validity of the act *and save it from annihilation*, to inject into it some meaning within the constitutional limitations of Congress, then we admit it would be the duty of the courts so to construe the act as to preserve, if possible, its constitutionality, and to give effect to it within constitutional limitations. AND THE SOLE ISSUE, ON THIS BRANCH OF THE CASE, CONCERNS THE CONSTITUTIONALITY OF THE ACT OF CONGRESS, JULY 24TH, 1866.

Before taking up this principal subject for argument, let us consider somewhat more fully *the nature and value of the rights granted by Congress.*

In the year 1866, the "public domain" of the United States, subject to pre-emption, was for the most part an unsegregated body of land between the Missouri River and the Pacific Coast. There can be no doubt that just as Congress had offered extraordinary inducements to private enterprise to build railroads across the continent in order that the distant Western States and Territories might be more closely united with the thickly populated States of the East, so the Act of 1866 was passed to encourage private enterprise to construct telegraph lines in all parts of the United States, affording instantaneous means of communication among the people of the whole country, thereby fostering a unity of sentiment that comes only from a unity of interest and sympathy. The War of the Rebellion had cost the people of the United States thousands and thousands of lives, and millions upon millions of treasure, to cure themselves of the illusion that

the Constitution of the United States was simply a covenant of federation among sovereign States, and not the creation of a sovereign nation. During the four years of war and the period of reconstruction, Congress had been obliged, perhaps, to stretch its constitutional powers to the utmost. *It had formed the habit of dealing with large questions largely.* In its estimation, and in the estimation of the whole country, there was no question so large and so pre-eminent as the question of national unity. This meant the homogeneity of the American people, and such homogeneity was possible only through mutual acquaintance, mutual affection, mutual interest and mutual dealings; *and all these were possible only through intercommunication.*

But why quote to this tribunal history so familiar? Simply that your Honors may recall the public and governmental needs of those times, and discern therein the purpose of Congress to supply those needs.

Considering then the physical, financial and political condition of the country in the year 1866, can it be thought for a moment that the grant of a right of way for the construction of a telegraph line across the "public domain" of the United States would be any inducement whatever to private enterprise to build such lines? From what source would the telegraph company obtain its patronage? What people were there on the public domain whose business interests required the use of the telegraph? As an *incidental* right, circumstances might arise which would make the grant of some value; but, as an inducement in and of itself, it had no value whatever.

And the same may be said of the right granted by Congress to take and use from the public do-

main the necessary stone, timber and other material for posts, piers, stations, etc. So far as any inducement to private enterprise, Congress might as well have granted the right to pick up pebbles on the seashore.

And what particular inducement was there in the grant of the right to pre-empt forty acres of preemptible land, provided so much should be needed for a station? For it will be observed that the grant was not of forty acres, but simply so much of forty acres as might be needed for a station. The grant of forty acres of land, the market value of which was not to exceed one or two dollars per acre, could hardly be called a glittering temptation to embark in the business of building telegraph lines "through the public domain."

The right to cross navigable streams and waters of the United States was, perhaps, a valuable right in the abstract, but had no particular practical value disassociated from the grant of right which immediately precedes it—to wit.: the right to construct, maintain and operate lines of telegraph, "over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by act of Congress."

Here was the inducement; *here* was the bait held out by Congress; *here* was the temptation offered to private capital and private enterprise. *It was the one right granted of intrinsic and practical value.*

By virtue of this authority, the telegraph company would have the right to construct, maintain and operate its lines over and along the roadways of a State, regardless of hostile State legislation, or exclusive grants made by the State to other companies; over and along the streets and alleys of

every municipality without negotiating with the aldermen thereof, except as to the terms of police regulation; over and along bridges, plank roads, turnpikes and railroads—in short, over and along any and every highway, which, by act of Congress, had been at the time, or which might at any time thereafter be declared and established post-roads of the United States.

If the telegraph company could have *these* rights under the act of Congress, it would be worth while to accept the impositions of the act. Armed with this authority, a telegraph company would seemingly have the right to construct, maintain and operate its lines anywhere and everywhere in the United States, if it cared to do so. And that it was the purpose of Congress to confer just such a right would seem certain from the following colloquy, taken from the debates in Congress, between Senator Nye, of Oregon, who was opposed to the bill, and Senator Sherman, of Ohio, who was the special champion of the bill:

"MR. NYE (of Oregon): There has never been in the annals of our legislature so sweeping a corporation as this, to construct a line of telegraph everywhere, wherever they please and at every station they are to get lands. There never was, in my judgment, such a corporation as this formed. If gentlemen are afraid of a monopoly, let them look at the title of this bill. I wish to make this inquiry of the Senator: *If this bill passes, will it authorize the National Telegraph Company to construct telegraphs in the United States wherever they have a mind to do so?*

"MR. SHERMAN (of Ohio): *Let me ask the honorable Senator, where is the objection to allowing telegraph companies to extend their telegraph lines anywhere in the United States?* WOULD YOU NOT LIKE TO HAVE

THEM EXTENDED TO EVERY MAN'S HOMESTEAD IF IT COULD BE DONE? WHY NOT? Then my friend must remember another thing, the National Telegraph Company is stricken out of the bill, and any company—he himself—may embark in the business.

"MR. NYE: Then, of course, this bill, if it passes at all, will consist simply of a single section, saying that any telegraph company existing, or that may hereafter exist, *may run a telegraph in the territory of the United States anywhere and get this land?*

"MR. SHERMAN: *That is the general privilege. Any telegraph company organized in a State may run the wires anywhere along the post-routes. They may take them to every man's door, if they choose, if it will pay*" (see Congressional Globe, Part IV., First Session, 39th Congress, pages 3480-3490).

As early as the year 1838 Congress had declared every railroad in the United States to be a post *route*. In the year 1853 it declared every railroad in the United States to be a post-*road*. Again in the year 1872, in a comprehensive act entitled "An Act to revise, consolidate, and amend the statutes relating to the Post Office Department," it was declared, "That all railways and parts of railways, which are now or may hereafter be put in operation, are hereby declared to be post-roads."

In the Act, July 24, 1866, Congress made an offer to the Western Union Telegraph Company that if it would submit to certain conditions and exactions, the Government of the United States would grant it the right to build its lines of telegraph over and along all the post-roads of the United States which were at the time, or that might at any time thereafter be declared such. The offer was accepted by the Western Union Telegraph Company in the year 1867. *Under the authority of this act it has, from the year 1867 to the present time, constructed its*

lines of telegraph along and over the roadways of every State, along and over the streets and alleys of nearly every city, and over, under and across nearly every navigable stream in the United States. Its right to do these things has never once been challenged since the decision in the Pensacola Case (96 U. S., 1). To be sure, it has in several instances been required, in thickly populated cities, to place its wires in conduits under ground. The right to constrain its action in this regard could, perhaps, be justified, on two grounds: (1) The police powers of a city, whereby every city is charged with the regulation of its streets; and (2) because the congestion of traffic of particular streets actually interfered with the ordinary travel on such streets, whereas the measure of petitioner's rights under the Act of Congress depends on its non-interference with ordinary travel.

Be pleased to note especially this limitation of petitioner's right under the Act of 1866. Petitioner claims no unqualified right to be or remain upon the post-roads of the United States. It admits—it is bound to admit—that its use of the post-roads is subsidiary to a primary use. It follows, from the very terms of its grant, that if to construct a telegraph line on a post-road would constitute an interference with the ordinary travel on that road, then the right to construct does not exist. Or if, having constructed its lines of telegraph upon a post-road, the subsequent maintenance of such lines, owing either to its own development or the development of traffic, should *grow* to be an interference, then its right to *remain* in its original location would *ipso facto* cease; and if it could not adapt itself, without interference, to the changed condi-

tions it must, under the very terms of its grant, cease to occupy the particular post-road.

Now, the words of the grant under which petitioner has claimed and exercised the right to occupy with its lines of telegraph the roadways of a state and the streets and alleys of a city, *give it an equal right to construct, maintain and operate its lines over and along the railroads of the United States.* Is there any reason in law why, from the grant of a right of user of all and all manner of post-roads, there should be excepted any particular class of post-road? If Congress has power over the highways of a State and the streets of a city to declare and establish them post-roads of the United States, must it stop short when it comes to a highway of a State called a railroad, operated by an agency created by the State?

As said by Mr. Justice BREWER in the Debs Case (158 U. S., 581):

"If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

If it is unwise or inexpedient to have constructed on the outer edges of a railroad right of way a line of telegraph poles and wires, then facts might be presented justifying a repeal of the Act of Congress or a modification of its provisions. Such argument, however, must be addressed to the Legislature, and not to the courts. Or, if the fact is that to construct or maintain a particular telegraph line on a particular railroad right-of-way would interfere with the ordinary travel on such post road, then, just as in the case of city streets, the right so

to construct and maintain would not exist. This fact, however, would be no reason to change the law, because Congress had the prescience in 1866 to forfend against such a contingency. In other words, *the question of interference with the ordinary traffic upon any particular post-road is always a question of fact, to be determined in the particular case.*

It may seem extraordinary that the Western Union Telegraph Company has never before invoked its rights under the Act of Congress to remain upon a railroad right-of-way, but any significance attaching to this fact is dispelled by the simple statement that never before the St. Paul M. & M. Case (118 Fed., 497) has it had occasion to do so. There is scarcely a railroad in the United States over and along which the lines of the Western Union Telegraph Company are not maintained and operated, and have been so maintained and operated since the invention of the railroad and the telegraph. Along the very railroads involved in this case the Western Union Telegraph Company and its predecessors in title and estate have maintained and operated lines of telegraph for more than half a century.

But heretofore this joint user has been by virtue of contracts between the telegraph and railroad companies, under the terms of which the telegraph company has not only constructed, maintained and operated its lines of telegraph along and over the railroad right of way, but has been permitted to establish its telegraph offices in railroad stations. This historical truth is important for several reasons:

First. It proves conclusively that there is no reason peculiar to railroads why this species of high-

way and post-road should not be occupied by telegraph lines as well as any other highway and post-road.

Second. It justifies the Act of Congress, July 24, 1866, because Congress did not create a new and artificial relationship between the railroad and telegraph, but simply recognized a relationship which these agencies themselves had created.

THIRD. Under particular contracts, railroad companies had bound themselves to give to the telegraph company an exclusive right over and along the railroad right of way, and such contracts prior to 1866 had been upheld (see *West. Un. Tel. Co. vs. Atlantic & Pacific Tel. Co.*, 7 Biss., 367). And, indeed, unless the Act of July 24, 1866, relates to the railroads of the country, as well as to other highways which have been declared post-roads, there is no reason in law why such an exclusive right should not be created by contract.

Express cases, 117 U. S., 1.
Chicago R. R. vs. Pullman Co., 139 U. S., 80.

But as early as 1879 Justice HARLAN, sitting in Circuit, declared in *Western Un. Tel. Co. vs. Amer. Un. Tel. Co.* (9 Biss., 72) that:

"Since the act of Congress of July 24, 1866, a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of Congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use has first been granted."

Afterwards, in 1884, Judge WALLACE, in the case of *West. Un. Tel. Co. vs. B. & O. Tel. Co.* (19 Fed. Rep., 660) declared

"A railroad is, under the statutes of the United States, a post-road, and accordingly *the act of Congress of July 24, 1866*, giving to all telegraph companies alike the right to construct, maintain and operate lines along all post-roads, *is paramount over any agreement made by a railroad company securing to a telegraph company the sole use of its line of road for its wires.*"

In 1895 the Supreme Court of the United States in *United States vs. Union Pac. Ry. Co.* (160 U. S., 1) declared:

"*Since the passage of the act of July 24, 1866, no railroad company, operating a post-road of the United States over which interstate commerce is carried on, can bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a State that has accepted the provisions of that act and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.*"

The language of these decisions seems to us to imply the absolute right of a telegraph company accepting the obligation of the Act of 1866 to construct, maintain and operate it lines of telegraph over the railroads of the United States, not only without the consent of the railroad company, but in the very teeth of a contract that it will not assent; otherwise, how could such a contract be declared illegal and void? Clearly, if the Act of 1866 has the effect of invalidating a contract otherwise legal, giving a telegraph company the exclusive uses of a railroad right of way, it must have powerfully modified the asserted control of all railroad companies over their rights of way. But

be this as it may, the act of Congress, and numerous decisions to the same effect as those last quoted, establish beyond cavil the proposition that *it is the policy of the law that a railroad right of way should be utilized for the construction, maintenance and operation of telegraph lines so long as such lines shall not interfere with the ordinary operations of the railroad.* And yet the trial Judge in his opinion (Rec., p.) says:

"A railroad's right of way is the artery of its life; * * * it was well said by Judge McKENNEN in a case in this court, later referred to, 'every reasonable intendment must be made in favor of the primary rights of the complainant (in that case a railroad seeking to prevent part of its right of way being re-appropriated) * * * No actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing TRACKS, the construction of additional ones, the convenient storage of its freight at all seasons and the unembarrassed transaction of its freight business.'"

It would seem from this language of the Trial Judge, and other language to like effect, that he would challenge the policy created by the Act of 1866, and announced by the Supreme Court of the United States, and that, in his opinion, a railroad right of way should be exempt from appropriation by a telegraph company. But is not the position of the Trial Judge weakened rather than strengthened by his allusion to the fact (Opinion, Rec., p.) that

"The Pennsylvania Railroad Company, prior to the beginning of this proceeding, *entered into a*

contract with the Postal Telegraph-Cable Company, dated June 25, 1902, whereby the railroad in substance agreed, in consideration of certain rentals to furnish that company with pole facilities upon its right of way for fifteen years, and permit the telegraph company to use the same for its wire?"

Is this not saying, in effect, that, while a railroad right of way is too sacred to be expropriated by a telegraph company, the railroad company may barter it, lease it, and appropriate it to this use upon terms agreeable to itself? It seems to us that, in the face of the declared policy of the Federal Government, as indicated in the Act of July 24, 1866, and the decisions of the Supreme Court of the United States relating to that act, this position of the Trial Judge is wholly untenable.

And he is equally mistaken in defining the *property* which the petitioner in error is here seeking to appropriate to its use. In his opinion (Record, p.) he says:

"What is here sought to be appropriated is the *ownership of, and title to, a part of the ground* constituting the general right of way of the railroad company."

Arguing from the false premise, he subsequently declares (Record, p.):

"If the railroad's future needs should demand the occupation hereafter of the whole of its present right of way for additional tracks, or if its own telegraphic necessities required it to duplicate on the north side the private telegraph lines it now has on the south side of its right of way, it is evident that it could not exclude from such the north side, or at all events from its right of way generally, a telegraph company that had condemned and acquired what is here sought."

In our Brief of Points we have answered this objection succinctly. Indeed, the answer is obvious. The Act of Congress (July 24, 1866) does not give, or affect to give, to any telegraph company accepting its provisions the right to condemn permanently to its use any portion of the *ground* constituting the highway or the post-road. It simply creates an easement within an easement—a right of way within a right of way—not permanent, but contingent upon the necessity of user for a primary purpose. *The petition in this case seeks only to establish the right granted.* It says so in so many words. The resolution of petitioner's Board of Directors says so. Furthermore, in order that its right of property may be specifically defined, it proposes that the judgment of the Court shall make its right of user subservient at all times to the paramount rights of the railroad company. This is by no means an unusual course of procedure (see authorities cited, Brief of Points, IX, Par. 6).

We deem it unnecessary to argue at length the proposition that Congress has jurisdiction over every foot of American soil within constitutional limitations. The Federal Constitution says that Congress shall have power to establish post-offices and post-roads. By this short sentence there was created a stupendous power. Under it has been evolved the entire postal system of the United States, comprehending not only the postal equipment, but a mass of law governing the use of the mails and postal facilities. When Congress declares that it shall be a crime for a person to deposit in, or take out of, post-offices a letter in furtherance of a scheme to defraud, it derives its authority for such an enactment from this short sentence in the Constitution. The letter it-

self may be perfectly innocent on its face—an ordinary business communication—the mere acknowledgment of money—and yet the Federal authorities look beyond the letter to the intent with which it was deposited in, or removed from, the post-office, and punish the intent of the writer or the receiver. The validity of this law has been upheld, because, if Congress has power to establish post-offices and post-roads, it must have as an incident to the power, the right to protect the mails from abuse and from becoming the instrumentalities of fraud.

So, under the power to establish post-roads, there is necessarily implied the right to regulate and prescribe the uses of such roads, and within this right Congress may act free from interference of State sovereignty or any agency created by the State.

More and more the people of the United States are coming to appreciate the words of Chief-Justice MARSHALL, in *Gibbons vs. Ogden*, 9 Wheaton, 1, where he says:

"The wisdom and the discretion of Congress, *their identity with the people*, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, *the sole restraints on which they have relied* TO SECURE THEM FROM ITS ABUSE. *They are the restraints on which the people must often rely solely in all representative governments.*"

That Congress has paramount jurisdiction over the *natural* highways of the country, such as navigable streams, has been conceded from earliest times. That its jurisdiction over the roadways of a State and the streets of a city for postal and military purposes is equally plenary, has likewise been established by numerous authorities. Does its ju-

risdiction stop short at *artificial* highways called railroads?

In *California vs. Pacific R. Co.* (127 U. S., 1), speaking for a unanimous Court, Justice BRADLEY says (p. 39):

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, *and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land.* But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

In *Re Debs* (158 U. S., 564), Justice BREWER, speaking on behalf of a unanimous Court, says (p. 586):

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. *It is*

charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from highways under its control."

Pause for a moment to consider the significance of this language. If resort may be had to the Federal courts to remove an obstruction on a railroad, *on the grounds that it is a public highway within the control of Congress*, should not Congress have some discretion in determining what constitutes an obstruction? Can a railroad company, operating such a highway, appeal to the courts to remove the poles and wires of a telegraph company on the grounds that they constitute an obstruction? Possibly it could have done so prior to the passage of the Act of July 24, 1866, and possibly it could do so since the passage of that act upon showing that the maintenance of the telegraph constitutes an actual interference with the ordinary traffic of such highway; but it is a familiar doctrine that a structure which the Legislature *authorizes* to be made upon a highway is a lawful structure, and cannot be removed as a nuisance or an obstruction.

Further in his opinion Justice BREWER also says (p. 589):

"It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways—the natural highways of the country—and not over *artificial* highways, such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. * * * Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in

the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways *has in no manner narrowed the scope of the Constitutional provision, or abridge the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.*

"*Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation.* * * * The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

And again he says (p. 599):

"Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government, through the executive branch and in the use of the entire executive power of the nation, to remove forcibly all such obstructions, it is equally within its com-

petency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such objections."

In *Cherokee Nation vs. Southern Kansas Railway Co.* (135 U. S., 641), Justice HARLAN, speaking for a unanimous Court, says (p. 657):

"The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, *and, therefore, subject to Government control and regulation.* It is because it *is* a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of right of way, upon making just compensation to the owner, in the mode prescribed by law."

In *Monongahela Nav. Co. vs. United States* (148 U. S., 312) Justice BREWER, on behalf of a unanimous Court, says (p. 342):

"But the power of Congress is not determined by the character of the highway. *Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads.* The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; *and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway.* They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. *There may be differences in the modes and manner*

of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the *States*, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. *But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway.* The fee of the soil in neither case is in the general government, but in the State or private individuals. *The differences between the two are in the origin—nature provides the one, man establishes the other.*"

More recently, in *Wisconsin, Minn. & Pac. R. R. Co. vs. Jacobson* (179 U. S., 287), Justice PECKHAM, rendering the opinion of the court, says (p. 296):

"Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations *have been founded upon that fact.* Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that *in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions.*

"It is *because* they are such highways *that the land upon which the rails are laid*, and also that which may be necessary for the other purposes of the corporation, *is said to be used for a public purpose*, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right

of the Legislature to tax in furtherance of such use is founded upon the same consideration that the use is a public one, and therefore taxation in support of such use is valid."

Summarizing at this point:

FIRST. We have established, after years of debate and hesitation, the indubitable and paramount authority of the United States over every foot of soil within its territory and within constitutional limits.

SECOND. Among the powers of Congress, now conceded and forever set at rest, is the right to use the highways of a State, natural and artificial, for military and postal purposes.

THIRD. We have the adoption by Congress of the Western Union Telegraph Company as a part of its postal and military machinery.

FOURTH. We have the grant from the United States to the Western Union Company of a qualified right to go over and along all the military and post-roads of the United States, including the railroads of the Pennsylvania Railroad Company.

FIFTH. We have the conceded fact that the user by a telegraph company of a railroad right of way without interference with the operations of the railroad is not only a reasonable user, but that every railroad right of way in the United States is, and has been since the invention of the railroad and telegraph, so used.

Is this grant by Congress to the petitioner in error a valid and constitutional grant? If not, why not? What element is lacking to its validity? It will be observed, of course, that the act does not, in express words, grant to the telegraph company

the power of eminent domain to appropriate private property generally. *The act itself* appropriates quasi-public property *specifically designated.* Nor is there any special machinery created by the act for the enforcement of its provisions. While the act does not require the telegraph company to pay to the railroad company any compensation for the use granted, it is equally true that there is no express declaration that compensation shall *not* be paid. So far as the act is concerned, the question of compensation remains open. If the Act of July 24, 1866, had declared in so many words that the right of user of the post-roads of the United States, including the defendant's railroads, was granted to the Western Union Telegraph Company free from any obligation to compensate the railroad company for such user, what then? Would the act be unconstitutional?

It is not every public use of private property that constitutes a "taking" of private property within the meaning of the constitution. Nor should it be forgotten that a railroad right of way is not "private" property. On the contrary, it is essentially public property. No railroad company has an absolute fee simple title to its right of way. It has, itself, only a right of user, with a reversionary intererest in the abutting owners. Such usually is the only right acquired by it under condemnation proceedings. But if a railroad company should purchase outright the land for its right of way, it would have no authority to sell the land again in the market, nor rent it for any purpose disassociated from the railroad unless specially authorized by statute.

In the case of *Pittsburgh & W. E. Pass. Railroad Co. vs. Point Bridge Co.* (165 Pa. St., 37; s. c., 30

Atlantic Rep., 511), the facts were that the Point Bridge Company was incorporated under Pennsylvania Statutes for the purpose of constructing a toll bridge and approaches thereto for public travel and accommodation across the Monongahela river. The Pittsburgh and West End Passenger Railway Company was incorporated two years later, and was proceeding to construct its line of railroad when it incidentally discovered that the tracks upon the bridge erected by the Point Bridge Company were adapted to the passage of horse cars, and thereupon used these tracks, running its horse cars over the bridge and paying the usual tolls to the bridge company for a number of years, when it concluded to equip and operate its road electrically. To this the bridge company objected, and denied it the right to cross the bridge. The railway company filed its bill in equity to restrain the Point Bridge Company from preventing the operation of an electric street railway over the toll bridge. In determining the controversy, the Supreme Court of Pennsylvania, by McCULLUM, J., first declared that the bridge of the defendant company was a public highway in its very nature, and as such every one who was entitled to use the public highway in a particular manner had the right to use the bridge in that manner, and that the sole right of the bridge company was the right to charge tolls for such use. The railway company had accepted the provisions of the Passenger Railway Act of May 14, 1889, and the Court held that by this acceptance the company became entitled to all the privileges, franchises and powers conferred by that act. The act authorized the formation of companies "for the purpose of constructing, maintaining and operating a street railway upon any street or highway for public use in the

conveyance of passengers by any power other than locomotive, and the Court says:

"Do the words 'any street or highway,' as used in this act, exclude bridges? We have already seen that a bridge erected for public travel and accommodation is a public highway, whether built and maintained by the inhabitants of the district, or by a corporation authorized to demand tolls for passage over it. * * * When the Pittsburgh & West End Passenger Railway Company accepted the provisions of the act, and acquired new letters patent, it was, and for ten years previous thereto had been, operating its railway by horse power on the route already described. The Point Bridge Company made no objection to the passage over its bridge of the cars of the railway company. The tolls were adjusted by an arrangement between the companies which was satisfactory to both. This arrangement continued until the railway company proposed to operate its road by electricity. It was the proposed change in the method of operating it that led to this litigation, in which the bridge company contends that the railway company has no right to use the bridge in moving its cars over its established route. The consent of the local authorities has been duly given to the latter to operate its railway on that route, and in the manner proposed. *It has all the powers, franchises and privileges granted by the Act of 1889 to street passenger railway companies.* * * * *The use of the bridge in the manner proposed does not constitute a taking of or any injury to the property of the bridge company, in the exercise of the power of eminent domain. It is a use which is reasonably consistent with the purpose for which the bridge was erected, and is necessary for public travel and accommodation.* We conclude, therefore, that under the legislation and with the municipal consent to which we have referred, the railway company has the right to operate its line across Point Bridge 'by any power other than by locomotive,' in such manner and on such terms as

will protect the rights of the bridge company and the traveling public. The learned court below, after a careful inquiry into the facts and circumstances affecting the issue raised by the bill and answer, entered a decree which appears to be reasonable and just. *It is a decree which carefully guards the rights of the bridge company, which properly regulates the use of the bridge by the railway company, and exacts from the latter the payment to the former of a toll rate, the adequacy of which is not questioned.*

"We have not overlooked the contention which denies to a court of equity jurisdiction of the matter complained of, but we cannot assent to it. On the contrary, we think the railway company applied to the proper tribunal for the relief sought."

This case, in principle, is on all fours with the case at bar, even to the judicial determination of the amount of tolls to be charged and the judgment regulating the relationship of the parties in the use of the public highway (see, also, cases cited under Point IV and Point X, in brief).

It will be seen from these cases that the ultimate authority as to what use of property constitutes a "taking" is the judiciary; but unfortunately the acts which one Judge would decree to be an appropriate use of property not constituting a taking, would, by another Judge be decreed to be a taking within the meaning of the Constitution. Various cases have held that the appropriation of a railroad right of way to the uses of a telegraph company, limited to non-interference with travel and railroad operations, was a *technical* "taking," but that the railroad company was entitled only to *nominal* damages, thus preserving an alleged abstract technical right under the Constitution, while actually

deciding that no right had been infracted and no injury inflicted. See, for instance,

Mobile & O. R. R. Co. vs. Postal Tel. Co., 41 *L. R. A.*, 403.

Mobile & O.R. R. Co. vs. Postal Tel. Co., 26 *So. Rep.*, 370.

Postal Tel. Co. vs. Or. Sht. L. R. R. Co., 65 *Pac.*, 735.

Postal Tel. Co. vs. Or. Sht. L. R. R. Co., 114 *Fed.*, 787-792.

Postal Tel. Co. vs. Or. Sht. L. R. R. Co., 104 *Fed.*, 623.

St. L. & C. R. R. Co. vs. Postal Tel. Co., 173 *Ill.*, 508.

Union Pac. R. R. Co. vs. Postal Tel. Co., 69 *Pac. Rep.*, 564.

Kansas & A. V. R. R. Co. vs. Payne, 46 *Fed.* 546, *reversed by Court of Appeals*, 49 *Fed.*, 114.

But even conceding that, in enforcing its rights under the grant from Congress, the petitioner in error would somehow, and to some extent, appropriate some possible private interests of the defendant railroad company in its right of way, would the grant, therefore, be void? Or would the petitioner be entitled to make its appropriation upon the payment of just compensation—the amount to be determined in a Court of Justice?

There are several cases, more or less antiquated, found in State reports to the effect that, where the Legislature has in express terms granted a right to appropriate private property, but has not specifically declared that just compensation must be paid therefor, nor invented special machinery for the exercise of the power of eminent domain, the omission

constitutes conclusive evidence that the Legislature shall be taken to mean, *not what it says*, but simply that the beneficiary under the act may acquire property *if he can do so with the consent of the owner*. We respectfully protest that such a doctrine of interpretation finds no sanction in any law of hermeneutics, and is against common reason and common sense; particularly so as applied to the acts of Congress. For, as said by Justice HARLAN in *Cherokee Nation vs. Southern Kansas R. R. Co.* (135 U. S., 641-657).

"It is not necessary that an act of Congress should express in words the purpose for which it was passed. The Court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution."

On general principles, why should the constitutional provision that property shall not be taken without just compensation, be copied into every legislative act providing for the appropriation of property, when, as a matter of law, every constitutional limitation is made part of the legislative act by implication and intendment? *If the beneficiary under the act must comply with the terms of the act, must he not also comply with the terms of the Constitution? The Legislature presumably intends that its act shall be effective according to its plain import. If thus to give the act its due effect it is necessary that the grantee also comply with some provision of the Constitution, then why not comply with the Constitution? Is not the Constitution, ex necessitate, a part of the act?* And it must be particularly noted that the clause of the Constitution relating to eminent domain is negative in its state-

ment. It says that private property *shall not be taken* for public use *without just compensation.*

Said Mr. Justice STRONG, in *Kohl vs. United States* (91 U. S., 367-372):

"The Fifth Amendment contains a provision that private property shall *not* be taken for public use without just compensation. What is that but an implied assertion that, on making just compensation, it *may* be taken?"

THIS CLAUSE OF THE CONSTITUTION, BEING NEGATIVE, IS SELF-ENFORCING.

Thus in *Hickman vs. City of Kansas* (120 Mo., 110; S. C., 41 Am. St. Rep., 684), it is said:

"It is also well-settled law that this article of the Constitution gives an absolute right and is self-enforcing, and although the Legislature may have enacted no law providing a mode for the ascertainment and payment of the compensation provided for, resort may be had by the party entitled to the right to any common-law action which will afford him adequate and appropriate means of redress." And further: "The rule is, that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common-law remedy, but the party may still sue at common law, as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative."

In *Re Rugheimer* (36 Fed., 369), SIMONTON, J., says:

"The objection is that nothing is said in this act about compensation to the owner of the land sought to be condemned, and that in this the act is in conflict with the Fifth Amendment, which declares, 'Nor shall private property be taken for public use without just compensation.' If the *right* to con-

demn private property for a public purpose rested on this act of Congress (*i. e.*, was *created* by it), there would be great force in this objection. *But the right of eminent domain does not rest on a statute or on a constitutional enactment* (citing *Boom Co. v. Patterson*, 98 U. S., 406). *It is an attribute of sovereignty, possessed by the general government as sovereign, to enable it to perform its proper functions. It is an authority essential to its independent existence and perpetuity.* * * * This right of eminent domain, being thus possessed by the United States, the *mode* of exercising it, in the absence of any express provision in the Constitution to the contrary, is within the discretion of the Legislature. Without doubt Congress, representing as it does, in the House of Representatives the sovereignty of the people, and in the Senate the sovereignty of the States, can, whenever it deems necessary, *order* private property to be appropriated for a public use. *Such order would be subject to the constitutional limitation, and would require that compensation should be made for such appropriation.*"

Nor would the failure to provide special machinery for ascertaining the amount of just compensation be a material omission. Indeed, in the earlier days of the Republic, the special commissions and tribunals created by statute for estimating damages in condemnation proceedings were attacked as unconstitutional, *the contention being that the defendant was entitled to a jury trial according to the common law.* But in theory of law, the determination of the question in any court of justice, and by whatever means, is conclusively presumed to be just. Nor in theory could there be any difference in the amount, whether the trial be had before a special commission or a jury duly impanelled.

At common law the ascertainment of damages was always by a jury summoned under the writ *ad quod damnum*. Concerning this writ Mr. Lewis, in his work on Eminent Domain, Vol. 2, Section 402, says:

"The writ of ad quod damnum.—*This is a common-law writ, and has been a favorite mode of procedure in this country,* especially in highway and mill cases. The writ should contain definite directions as to what the jury are to consider, and should conform to any statutory provision which may be applicable. Either the order or the writ should specify the time and place of the meeting of the jury. Though directed to the sheriff, it may be executed by his deputy. The return may be amended even after the sheriff has gone out of office" (see, also, Cases cited in Brief, Point XII., p. 6).

In *Kohl vs. United States, supra,* the act authorizing condemnation provided no machinery, and the trial was had before a jury according to the common-law method.

See, also,

United States vs. Jones, 109 U. S., 513.
High Bridge Co. vs. United States, 69 Fed., 320.
Dashiell vs. Grosvenor, 66 *id.*, 338.
McElroy vs. Kansas City, 21 Fed., 257, per BREWER, J.

The first syllabus in this case reads as follows:

"The damage to property, by the Constitution of Missouri, is placed upon the same basis as the value of the property taken, and neither can be done without compensation first made. *This Constitutional guaranty needs no legislative support, and is beyond legislative control.*"

In his opinion the learned Judge says (p. 259):

"Complainant insists that this provision of the Constitution is imperative; that it does not depend for its force upon the Legislature; that it cannot be defeated by the want of action on the part of the Legislature; and that the courts are bound absolutely to enforce its mandates, and restrain any public action which either takes or damages private property until the value of the property taken, or the amount of damage done to property not taken, has been ascertained and paid. It is obvious that this question is of momentous importance, for as no provision has been made for ascertaining the damages to property not taken, the only way that this can now be ascertained is by personal agreement, which, if the claim of complainant is wholly sustained, would place every public improvement at the mercy of any party whose property is injured thereby. * * * The question is, can the imperative mandates of the Constitution be practically defeated by the want of action on the part of the Legislature? * * * The Constitution is the final law, measuring all private and public rights, whose commands Legislatures and courts must respect; whose mandates, when imperative, must be enforced, regardless of all consequences. * * * I know that there are many provisions of the Constitution which are not self-executing—which are, so to speak, dormant until the Legislature acts; as where *rights* are given, *to be exercised in a way provided by the Legislature.* * * * I hold, therefore, that the rule of the Constitution is the same in respect to property damaged as to property taken, and that such Constitutional guaranty needs no legislative support, and is beyond legislative destruction. * * *

"When the defendant has an ultimate right to do the act sought to be restrained, *but only upon some condition precedent*, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies

at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all of those cases the Legislature has placed at the command of the defendant means for ascertaining the value of the property. * * *

"Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, and the means of complying with such conditions are not at his command, the courts will endeavor to adjust their orders as on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. *Thus, in the case at bar, the defendant has, of course, the ultimate right to grade this street. As a condition of such right is a payment of damages, but it has no means of ascertaining those damages; no tribunal has been created, no provision of law made, for their ascertainment. Hence, if possible, the court should provide for securing to the defendant this ultimate right, and at the same time give to the complainant the substantial benefit of the prior conditions.* * * *

"The order, therefore, will be that upon the giving of a bond in the sum of $3,000, and the filing of a stipulation to accept such damages as shall be ascertained in the manner hereinafter provided in full satisfaction of all claims against the defendant, the defendant will be restrained from grading said street; provided, that at any time the defendant may, upon 20 days' notice, apply to either of the judges of this court for the appointment of a board of commissioners of three freeholders to ascertain and report the amount of damages which complainant will sustain by reason of the grading of said street, and upon the payment of the damages so reported by such commissioners the injunction will be vacated. The report of a majority of the commissioners will be the report of the board, and either party may appeal to the judge appointing such commissioners for a review of their report."

Compare this decree with that of Judge THAYER in *St. Paul M. & M. Ry. Co. vs. W. U. Tel. Co.*, 118 Fed., 497.

In the case of *St. Louis vs. Western Union Telegraph Company* (148 U. S., 92), Justice BREWER, speaking on behalf of the majority of the court, held that the City of St. Louis had a right to charge the telegraph company a reasonable compensation for the use of the streets, and, in concluding his opinion, says (pp. 104-5):

"Indeed, it may be observed in the line of thought heretofore expressed that this charge is one in the nature of rental; *that the occupation by this interstate commerce company of the streets cannot be denied by the city;* that all that it can insist upon is, in this respect, *reasonable compensation for the space in the streets thus exclusively appropriated*, and it follows, in the nature of *things*, that it does not lie exclusively in its power to determine what is reasonable rental. *The inquiry must be open in the courts.*"

In these concluding remarks, the Supreme Court of the United States has given utterance to every principle for which we contend:

FIRST. That, having accepted the obligations of the Act of Congress, July 24, 1866, the Western Union Telegraph Company has the right to construct, maintain and operate its lines of telegraph over and along the post-roads of the United States, including the streets and highways of the City of St. Louis, and the railroads of the defendant railroad company.

SECOND. That its occupation of such post-roads cannot be denied by the owners of such post-roads, whether city or railroad.

THIRD. That all that such owner can insist upon is, in this respect, reasonable compensation for the space exclusively appropriated.

FOURTH. And that it follows in the nature of things that it does not lie exclusively in the power of such owner to determine what is reasonable compensation, but that the inquiry must be open in the courts.

The right claimed by the petitioner in error to occupy the railroads of the defendant in error is derived from the same grant of Congress as its right to occupy the streets and highways of the City of St. Louis. Its grant in both instances is in identical language. This language does not specify either the streets of a city or the roadways of a railway company, except under the general phrase "military and post-roads," which applies equally to both. If the streets of St. Louis are to be *included* in the grant, and the railroads of the defendant in error *excluded* from the grant, where does the court find its authority for including the one and excluding the other? That it applies equally to both has been determined in the following cases:

Postal Tel. Co. vs. Or. Sht. L. R. Co., 114 *Fed.*, 787.

Postal Tel. Co. vs. Or. Sht. L. R. Co., 65 *Pac. Rep.*, 735.

Postal Tel. Co. vs. Southern Railway Co., 89 *Fed.*, 190.

Cf., St. Paul, M. & M. Ry. Co. vs. W. U. Tel. Co., 118 *Fed.*, 497.

Counsel for defendant in error contend, however, that the Supreme Court of the United States has construed the Act of July 24, 1866, contrary to the principles and cases herein set forth.

Two cases only are relied upon in support of this contention: The PENSACOLA CASE, 96 U. S., 1; and the ANN ARBOR CASE, 178 U. S., 239. Neither of these cases is an authority in point, for the following reasons:

1. The right of a telegraph company accepting the obligations and restrictions of the Act of July 24, 1866, to appropriate private property, was not in issue in either case, and all that is said by the particular justice, voicing the decision of the court, as to the scope of the act beyond the points directly in issue, is clearly *obiter*.

2. If the meaning of such *obter dicta* is as contended for by counsel for respondent, then it is inconsistent with other statements made by the very Justices rendering these opinions, and diametrically opposed to the ruling of the Supreme Court of the United States in other cases.

3. The *dicta* in these two cases do not require, and only by forced construction admit of, the construction placed upon them by respondent's counsel:

This will appear upon an analysis.

The Pensacola Case.

The Legislature of Florida, on the 11th of December, 1866, passed an act incorporating the Pensacola Telegraph Company and granting it "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the Counties of Escambia and Santa Rosa." On the 24th of June, 1874, the Pensacola and Louisville Railroad Company granted to the Western Union

Telegraph Company the right to erect a telegraph line upon its right of way which lay through the counties above named. The Western Union Telegraph Company was proceeding to build its lines along the railroad right of way when the Pensacola Telegraph Company sought to enjoin the work and use of the land on account of the alleged exclusive right of that company under its charter. The Western Union Telegraph Company defended under the Act of Congress, July 24, 1866.

Here was the sole issue. The question whether the Western Union Telegraph Company, by accepting the provisions of the act, was authorized to use the right of way over and along the railroad willy-nilly, the railroad company was not even remotely involved. Anything said concerning such a right, therefore, is not only *obiter*, but extra-judicial.

It should be remembered that this was the first case arising under this Act of Congress. The War of the Rebellion had been brought to a close only ten or twelve years previous. The war had settled many questions, to be sure, at that time only half realized, and the great body of law since evolved out of the interstate commerce clause of the Federal Constitution was totally undreamed of. This is apparent from the vehemence with which various questions were debated, as appears from the dissenting opinion in the Pensacola case, and the tentative, dubious statement of principles which to-day are legal commonplaces.

It was evidently in answer to some of the moot doctrines urged by the dissenting Justices in conference, and voiced by Mr. Justice FIELD in his dissenting opinion (doctrines subsequently wholly repudiated by Justice FIELD, who, about the time of

the Neagle case (135 U. S., 1), became a pretty good Federalist himself), that Chief Justice WAITE, voicing the majority opinion, uses the following language (p. 11):

"It (the Act) gives no foreign corporation the right *to enter upon private property* without the consent of the owner and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And again (p. 12):

"*No question arises* as to the authority of Congress to provide for the appropriation of *private* property to the use of the telegraph, *for no such attempt has been made.* The use of *public* property alone is granted. If *private* property is required, it must so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with; only national privileges are granted."

This language of the Chief Justice, if it has the limited meaning attributed to it by counsel for respondent, is certainly inconsistent with the meaning suggested by his language in *Telegraph Company vs. Texas* (105 U. S., 460); for (on page 464) Chief Justice WAITE says:

"Congress, to facilitate the erection of telegraph lines, *has by statute* AUTHORIZED *the use of the public domain and the military and post-roads*, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this *privilege* those who avail themselves of it are bound to give the United States prece-

dence in the use of their lines for public business at rates to be fixed by the Postmaster-General. *Thus, as to government business, companies of this class become government agencies.*"

He had already, in the Pensacola case, used the following language in defining what were military and post-roads (96 U. S., 11):

"It is insisted, however, that the statute extends only to such military and post-roads *as are upon the public domain;* BUT THIS WE THINK IS NOT SO. * * * *There is nothing to indicate an intention of limiting the effect of the words employed; and they are, therefore, to be given their natural and ordinary signification.*"

In the third place, the language employed by the Chief Justice in the Texas case and in the Pensacola case, while obviously inconsistent if the contention of respondent's counsel is correct, is easy to be reconciled if fairly construed; for it is literally true, as stated by the Chief Justice, that Congress had *not* attempted to provide for the appropriation of *strictly private property* to the use of the telegraph. A railroad doing interstate business is not, as we have shown, a private corporation; its property is not private, for it is devoted to the service of the public, and the corporation is simply a trustee of such property, the usufruct belonging to the public.

In the language of Justice BRADLEY in Stockton vs. Baltimore & N. Y. Railroad Co., 32 Fed. Rep., 20:

"It matters little whether the United States has or has not the *theoretical* ownership and dominion. * * * *It has what is more, the regulation and control of them for the purposes of commerce.*"

It does not militate against the *dictum* of the Chief Justice to say that, if, to make available its

grant by Congress of the use *of particular public property*, it becomes necessary to make compensation *for private property incidentally taken*, the telegraph company shall be permitted to do so. Otherwise, what becomes of the grant? Would you nullify the grant itself in behalf of an incident to the grant?

It is somewhat remarkable that a recent text writer on Constitutional Legislation, in his interpretation of the Pensacola case, has gone as far in one direction as counsel for defendant have gone in the opposite direction to extract a meaning from the case which the language of the opinion and the facts actually involved by no means warrant.

Says Mr. Ordronaux, in his work on Constitutional Legislation (p. 557): "The act of July 24th, 1866, granting to telegraph companies authority to maintain and operate lines of telegraph over and along any of the military or post roads of the United States which have been or may hereafter be declared so by Act of Congress is plainly an exercise of suppletory power of the most far-reaching character. Whether Congress has the power to require a railroad corporation to permit telegraph companies to use its *road bed* under its power to regulate commerce and to establish post offices and post roads *has been decided affirmatively in the case of the Pensacola Telegraph Company v. The Western Union Telegraph Company.* This decision, which appears to rest mainly on grounds of public policy and broadens the powers of the general government to an unprecedented degree, recognizes the right of Congress to keep pace with the progress of the country and to adapt itself to the new developments of time and circumstances."

The author, MR. JOHN ORDRONAUX, LL.D., represents himself to be a Professor in the Law School of Columbia College. His reading of the Pensacola case was certainly most careless, and his deduction wholly unwarranted; for the Pensacola case no more decided that a railroad corporation could be required to permit telegraph companies to use its "road bed" than it decided to the contrary. The point was not in the case and could not, therefore, have been decided one way or the other. Nor has the precise point ever been determined by this court up to the present time; the nearest approach to a decision of the question here involved being the St. Louis case which, in our humble opinion, is identical in principle with the case at bar and which, by reading into the act of July 24th, 1866, the Fifth Amendment of the Federal Constitution, not only saves the act from assault on Constitutional grounds but demonstrates that the provisions of the act, subject to the Constitution, are most reasonable and beneficent.

The Ann Arbor Case.

In this case the Western Union Telegraph Company, a corporation of New York, filed its bill in the State Court of Michigan to restrain the Ann Arbor Railroad Company, a corporation of Michigan, from interfering with certain telegraph lines along the defendant's railroad. The principal contention of the telegraph company was that the provisions of a contract made with the Frankfort and Southeastern Railroad Company were binding on the Ann Arbor Company, which had purchased the property and franchises of the Frankfort and Southeastern Railroad Company at foreclosure sale.

The 6th paragraph of the bill read as follows:

"6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster-General its acceptance of the provisions of the act of the United States passed July 24, 1866."

This was its only reference to the act in question. No rights were claimed by vrtue of the act nor the acceptance of its provisions. No rights under the Federal law of any description were claimed, suggested or hinted.

The case was removed *by the defendant railroad company,* upon the ground that the suit was one arising under the Constitution and laws of the United States, and especially under the Act of July 24, 1866, from the State to the Federal Courts, *no question of the right to remove being raised by the Telegraph Company, plaintiff.*

The telegraph company failed in its contention that a contract with one railroad company had been ratified and adopted by its successor through foreclosure proceedings, and appealed to the Supreme Court of the United States.

On its own motion, the Supreme Court raised the question of the jurisdiction of the Federal Courts, and remanded the case to the State Courts *on the ground that the complainant had not so framed its bill as to raise any question under the Act of July 24, 1866,* and, therefore, the case did not fall within the provisions of the removal acts.

Here, it will be observed, there was no issue raising the question whether or not the Act of July 24, 1866, gave to a telegraph company accepting its terms the right to use the railroad as a post road of the United States.

Mr. Chief-Justice FULLER, says (p. 243):

"The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights."
* * *

"*It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property.*"

At this point, it seems to us, the opinion should have concluded, for the court had affirmed that the bill was one for specific performance of a contract involving no Federal question; and that, while reference was casually made in the bill to complainant's acceptance of the provisions of the Act of Congress, no right was claimed under it. Therefore, there was no Federal question in the case.

But the learned Chief Justice adds:

"And it has been long settled that that statute (July 24, 1866), did not confer on telegraph companies the right to enter on private property without the consent of the owner and erect the necessary structures for their business."

He then quotes from the Pensacola case as follows:

"But it does provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Continuing, the opinion says:

"In that case Mr. Chief Justice WAITE further said: 'No question arises as to the authority of Congress to provide for the appropriation of pri-

vate property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.'"

But Chief Justice FULLER does not conclude his opinion at this point, and his further language (p. 244) is of great significance:

"We are unable to perceive that Paragraphs Sixth and Seventh met this requirement, and it does not appear to us that they were intended to do so by the pleader. * * * But it was argued *that, by virtue of the statute*, the telegraph company was *possessed of a public character and was discharging public duties*, and that, although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the Circuit Court should have so framed its decree as to preserve the occupancy of the telegraph company, *subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the court.* It is sufficient to say that the bill was not framed in that aspect, and, though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. *And it is entirely clear that there were no averments in the bill in respect of this contention which would bring the case within the category of cases* arising under the Constitution or laws of the *United States so that jurisdiction could be held to have rested on that ground.*"

Why use this language if the contention of respondent's counsel is correct? How can it be reconciled with the language of the Chief Justice just preceding, if such language had the meaning at-

tributed to it? Does not the Chief Justice intimate, as plainly as words can convey ideas, that if in its bill the Western Union Telegraph Company *had* contended that by virtue of the statute passed July 24, 1866, the telegraph company was possessed of a public character and was discharging public duties, and had prayed for a decree to preserve the occupancy of the telegraph company subject to making compensation to the railroad company, to be ascertained by the court, *a Federal question would have been presented and duly passed upon?*

IN THE CASE AT BAR SUCH A CLAIM IS MADE, AND SUCH A PRAYER IS OFFERED; AND, FOR THE FIRST TIME SINCE THE PASSAGE OF THE ACT, THE ISSUE IS HERE SQUARELY PRESENTED TO THE SUPREME COURT OF THE UNITED STATES WHETHER AN INTERSTATE RAILROAD, DECLARED BY CONGRESS TO BE A POST-ROAD, IS AS MUCH WITHIN THE PURVIEW OF THE ACT OF CONGRESS, JULY 24, 1866, AS ANY OTHER PUBLIC HIGHWAY.

This argument, may it please the Court, has already lengthened beyond our expectations.

As to complainant's rights as lessee of the property and franchises of the Atlantic and Ohio Telegraph Company, our Brief of Points contains in outline the argument for our contention, and we respectfully submit the case on the statement therein made and the authorities therein cited.

HENRY D. ESTABROOK,
Attorney for Petitioner-in-Error.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

WESTERN UNION TELEGRAPH COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY *et al.*

APPEAL FROM AND ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 89, 199.* Argued October 19, 20, 1904.—Decided December 12, 1904.

The act of Congress of July 24, 1866, 14 Stat. 221, Rev. Stat. §§ 5263 *et seq.*, giving telegraph companies the right to construct and operate their lines through, along and over the public domain, military or post roads and navigable waters of the United States, was a legitimate regulation of commercial intercourse by telegraph among the States and appropriate legislation to carry into execution the power of Congress over the postal service; it was merely an exercise of National power to withdraw such intercourse from state control and interference.

This court has already held in *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, and *Western Union Tel. Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239, and now follows those decisions that the act of July 24, 1866, does not confer upon telegraph companies, the right to enter upon private property without the consent of the owner or grant them the right of eminent domain.

A railroad's right of way is property devoted to a public use and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control but it is so far private property as to be entitled to the protection of the Constitution so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of the power of eminent domain is that the statute conferring it make provision for compensating the owner.

No statute of New Jersey makes railroad property subject to occupation by telegraph companies under the act of Congress of 1866.

THIS is a bill in equity filed in the Circuit Court of the District of New Jersey by the appellant against the appellee, the Pennsylvania Railroad Company, to prevent the latter from removing from various railroad companies' rights of way the telegraph lines of the appellant. The bill was filed in aid of a petition on the law side of the court, praying the court to issue its process or take such modes of procedure as might be

agreeable to the principles and usages of law, to determine the amount of compensation to be paid by appellant to appellee for the use of the right of way of the appellee, and its branches and connecting lines, to construct, maintain and operate a line of telegraph over and along such railways, subject to the conditions and provisions named in the act of Congress of July 24, 1866. 14 Stat. 221, c. 230; Rev. Stat. §§ 5263 *et seq.*

The construction of this act of Congress is the main question in the case.

The appellant, which we shall designate the Telegraph Company, contends that under certain acts of Congress the roads of the Railroad Company and all other railroads in the United States are made post roads, and that by the act of July 24, 1866, the Telegraph Company has the right to construct, maintain and operate lines of telegraph along said roads upon the payment of compensation to the Railroad Company. In other words, the contention is that by the act of 1866 the Telegraph Company is given the power of eminent domain to acquire the right to occupy with its telegraph lines the rights of way of the Railroad Company.

A summary of the bill is as follows: The Telegraph Company is a New York corporation; the Railroad Company is a Pennsylvania corporation. The New Jersey Railroad and Canal Company was incorporated under the laws of New Jersey and is the owner of a railroad extending from Jersey City in the State of New Jersey to the Delaware River at the city of Trenton in said State, with certain branches, which the bill describes. The Railroad Company is the owner of a line of railroad extending from the city of Philadelphia to the city of Pittsburgh in the State of Pennsylvania, and in possession and control of the railroads of the New Jersey Railroad and Canal Company in New Jersey, under a lease or leases for a period of nine hundred and ninety-nine years from the first of July, 1871. By the laws of New Jersey the said railroads were created, and made and are now, public highways, and hence are subject to occupation and use of telegraph companies

under the provisions and conditions of the act of Congress of July 24, 1866.

The Telegraph Company was organized in 1851, and began then to construct and has constructed and acquired a continuous system of telegraph lines, which extends through all of the States and Territories of the United States and connects with telegraph lines in the Dominion of Canada, and with lines also in the Republic of Mexico and South American Republics, and with and by submarine cables with the systems of all telegraph lines of foreign countries.

The system operated directly by the Telegraph Company consists of over 192,000 miles of poles and cables, and over 900,000 miles of wire, and that an important part of the system and connected with its main office in New York City, and with other lines leading to the important cities of the West, is the lines of telegraph over and along the lines of railway operated by the Railroad Company, connecting Jersey City with Philadelphia, and connecting with other lines of the system.

The lines of telegraph along the railways in New Jersey were originally constructed by the American Telegraph Company, a corporation of the State of New Jersey, with the consent of or under contracts and arrangement with the railway company, then owning the said lines of railway, and were constructed more than forty years ago, and since the twentieth of September, 1881, the telegraph lines over the right of way of said railroads have been maintained and operated and compensation paid therefor under the provisions of a contract between the Telegraph Company and the Railroad Company. The contract granted to the Telegraph Company the right to place, maintain and use upon the line of the right of way of the Railroad Company, and of the railroads owned, operated or leased by it, a single line of telegraph poles (in certain cases two were authorized), with the privilege of erecting and maintaining thereon such number of wires as the Telegraph Company might from time to time elect, said lines

to be located and placed under the direction of an officer of the Railroad Company.

The Telegraph Company agreed to pay annually for the privileges granted the sum of $75,000, in monthly installments of $6,250, and to deliver to the Railroad Company certain poles and wire, which were then on certain of their roads. The Telegraph Company also agreed to transmit the messages of the Railroad Company at a compensation which was stated.

The provisions for the termination of the agreement and in the event of its termination are as follows:

"Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their sucessors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing.

* * * * * * * *

"Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered to the treasurer, or an executive officer of the party in default, or if any other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfilment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due, or for damages for non-fulfillment of such covenant or of any other covenant.

"Sixteenth. If no new agreement be made by the parties hereto, the Telegraph Company shall, at the termination of this contract, or at any time hereafter, upon receiving written notice from the Railroad Company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the Railroad Company in good condi-

tion and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the Railroad Company, and if not so removed the Railroad Company may remove them at the expense of the Telegraph Company: *Provided, however,* That the payment agreed to be made by the Telegraph Company to the Railroad Company in the sixth clause hereof, and by the Railroad Company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same."

The agreement contains the following provision:

"Any easement or right of way heretofore acquired by the Telegraph Company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the Railroad Company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the Telegraph Company upon the right of way of said Railroad Company shall be such only as are granted by this agreement, and shall cease with its termination."

The agreement was carried out and the payments made as provided, the last being made on the twentieth of June, 1902.

On the fourteenth of May, 1902, the Railroad Company notified the Telegraph Company in writing to remove its poles, wires and other property from the right of way and property of the Railroad Company and of the other companies mentioned in the agreement, within six months from the first day of June, 1902. The notice stated that in default of compliance the Railroad Company would itself cause such poles, wires and other property of the Telegraph Company to be removed from the right of way at the expense of the latter company.

It is alleged in the bill that, by reason of the facts set forth, and by reason of the receipt of payments after the twenty-first of September, 1901, and after the notice of removal, the agreement was continued in force, and that the Railroad Company had no right, notwithstanding the notice of May 14,

1902, to remove or cause to be removed from the line of its railways the poles, wires and telegraph property of the Telegraph Company at the end of six months from the first day of June, 1902.

It is also alleged that the lines of telegraph have been maintained and operated over the lines of railway without interfering with the ordinary use and operation thereof or the ordinary travel thereon, and, as now located, maintained and operated, can be continued so as not to interfere with the future operation and maintenance of the said railways or the ordinary travel upon them, subject only to such slight changes of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way or shifting the tracks already existing on said railways.

May 20, 1902, the president and general manager of the Telegraph Company, in a letter addressed to the president of the Railroad Company, acknowledged receipt of the notice of removal of May 14, and stated that he understood that negotiations had been in progress between the officers of the respective companies for a renewal of the contract of September 20, 1881, and declared that he would be glad to take up the matter actively, either in New York or in Philadelphia, at the convenience of the president of the Railroad Company. The following day the president of the Railroad Company replied, stating that none of the companies named "desires to renew or extend its contract with the Western Union Telegraph Company," and that the contract between the companies had terminated under its terms on the twentieth of September, 1901, and the notice to the Telegraph Company to remove its poles had been given in accordance with the provisions of the contract. A willingness to discuss any temporary arrangement which might be necessary during the time allowed for the removal of the poles of the Telegraph Company was expressed. A somewhat lengthy reply was made, in which the Telegraph Company claimed that since some of the contracts referred to by the Railroad Company were per-

petual in their terms, or ran during the life of the parties, they could not be terminated by one party without the consent of the other; asserted a right, under the laws of Congress and the laws and constitution of the State of Pennsylvania, to maintain and operate its lines of telegraph on the Railroad Company's roads, subject only, at most, to make a fair and reasonable compensation for such right, which it offered to pay, and requested, if the Railroad Company declined to contract further with it, a meeting for the purpose of agreeing upon the amount of such compensation, or to submit the matter to arbitration. The Railroad Company replied that the meeting requested would be useless, as the Telegraph Company asserted rights upon the lines of the Railroad Company which could not be conceded. It was stated in the reply that the Railroad Company had agreed and contracted with the Postal Telegraph Cable Company covering the railroads included in the contract with the Telegraph Company, and that the Postal Telegraph Cable Company would immediately commence transacting a commercial telegraph business at the stations of the Railroad Company. The Railroad Company offered to permit the Telegraph Company to do business at the railroad stations until September 30, next ensuing (1902); and for the purpose of avoiding unnecessary loss to the Telegraph Company, incident to the removal of its poles, the Railroad Company expressed a willingness to purchase, at a fair valuation, such of the lines as it could make use of.

It is alleged in the bill that the notice given to the Telegraph Company to remove its poles from the railroads, and the refusal of the Railroad Company to negotiate further with the Telegraph Company, was not induced from any compulsion or necessity to use the space occupied by the telegraph lines; but that the purpose of the Railroad Company is to place upon the lines of railway telegraph lines to be owned or used by another telegraph company, and it is alleged that the lines of the Telegraph Company will not interfere with the ordinary travel and use of the railways.

The directors of the Telegraph Company accepted the act of July 24, 1866, and filed an acceptance with the Postmaster General of the United States June 8, 1867.

The acts of Congress hereinafter mentioned and set out are referred to in the bill, and a full compliance therewith alleged, whereby, it is further alleged, the Telegraph Company became and is entitled to maintain its lines on the railroads of the Railroad Company upon paying just compensation, the payment of which was offered. The prayer is that the court order and decree the amount of compensation to be paid by the Telegraph Company, or, if the court order compensation to be ascertained at law, it then be decreed that upon payment of such compensation a perpetual injunction issue.

A preliminary injunction was ordered. 120 Fed. Rep. 981. It was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33.

A controversy ensued upon the form of the decree. The Circuit Court of Appeals simply reversed the order of the Circuit Court granting a preliminary injunction. The Telegraph Company moved that the decree be modified so as to direct the dismissal of the bill. The motion was refused, and the Telegraph Company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the Telegraph Company appealed therefrom to the Circuit Court of Appeals. The case was then removed to this court by certiorari.

Mr. John F. Dillon, *Mr. Rush Taggart* and *Mr. Henry D. Estabrook*, with whom *Mr. Richard Vliet Lindabury* was on the brief, for appellant and petitioner:

The Telegraph Company, having in 1867 accepted the conditions of the act of 1866, and faithfully performed all the obligations imposed thereby, has paid and is paying to the Federal Government a full and continuing consideration for the rights granted by Congress under those acts, and has thereby become not only a special and peculiar agency of the

Government, but the Government, under its option of purchase, has acquired a vested interest in the property and franchises of petitioner more real and tangible than its interest or property in the public mails committed to its charge. 14 Stat. 221; Rev. Stat. §§ 5263 *et seq.* The Federal Government has a property in the mail. *Searight* v. *Stokes*, 3 How. 151; *In re Debs*, 158 U. S. 583. See also act of June 10, 1872.

The Government of the United States has jurisdiction over every foot of soil within its territory, and within its enumerated powers has full attributes of sovereignty within the limits of those powers, among which are the power over interstate commerce and the power to establish post offices and post roads. *Western Un. Tel. Co.* v. *James*, 162 U. S. 650; *In re Debs*, 158 U. S. 564; *Gibbons* v. *Ogden*, 9 Wheat. 1; *L. S. & Mich. So. R. R.* v. *Ohio*, 173 U. S. 285.

To trace historically the evolution of the doctrine in question, see 2 Story Const., Ch. 18; 1 Kent's Com. 267, and the portions of Elliott's Debates therein referred to; *United States* v. *Kochersperger*, No. 15,541, Fed. Cases; the various cases growing out of the abandonment of the Cumberland Road, particularly *Searight* v. *Stokes*, 3 How. 150, 1845; *Neil* v. *Ohio*, 3 How. 720; *Achison* v. *Huddleson*, 12 How. 293.

Federal sovereignty can appropriate property within a State without the consent or acquiescence of the State. *Trombley* v. *Humphry*, 23 Michigan, 471; Cooley's Const. Lim. cited in *Kohl* v. *United States*, 91 U. S. 367.

When the highways of a State are, by act of Congress, established post roads of the United States, they become part of the postal equipment of the Federal Government and subject to its paramount authority for postal and military purposes.

The constitutionality of the act of 1866 has never been questioned. It has uniformly been held that under this act, telegraph companies accepting its provisions have the right to occupy with their lines of telegraph the streets of a city and the roads of a State which by act of Congress have been

established post roads of the United States. *Postal Tel. & Cable Co.* v. *Oregon Short Line R. R. Co.*, 114 Fed. Rep. 787; *W. U. Tel. Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 554.

If the highways, owned and operated by a State, are subject to the paramount authority of Congress for postal and military uses, could anything less be said of a highway, such as a turnpike, authorized by the State, but operated by a corporate agency created by the State. *West. Un. Tel. Co.* v. *City of New York*, 38 Fed. Rep. 552; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92; *United States* v. *Union Pac. Ry.*, 160 U. S. 1; *Postal Tel. Co.* v. *Oregon Short Line R. R.*, 65 Pac. Rep. 735; *Hewett, et al.*, v. *Western Union Tel. Co.*, 4 Mackey, 424.

The primary use of a highway is for the purpose of travel, but the occupation of the highway by telegraph lines, if so maintained and operated as not to interfere with the primary use, is not only permissible, but, thus limited, has been held not to constitute an additional servitude. A highway is created not alone for the purpose of travel, but for commerce and the transmission of intelligence. *Julia Building Association* v. *Bell Tel.*, 88 Missouri, 258; *Cater* v. *Northwestern Tel. Ex. Co.*, 60 Minnesota, 593; *Magee* v. *Overshiner*, 40 L. R. A. 370; *People* v. *Eaton*, 100 Michigan, 208; *Pierce* v. *Drew*, 136 Massachusetts, 75; *Hershfield* v. *Rocky Mt. Bell Tel. Co.*, 2 Montana, 103.

A post, etymologically defined, is a mode of conveying written or *unwritten* intelligence. According to this the telegraph is a "post." *United States* v. *Kochersperger*, 26 Fed. Cas. 803.

A railroad is a highway, not simply *sub modo*, but intrinsically and *per se*, in the same category precisely as roads, streets, alleys, turnpikes, plank roads, tramways, bridges, ferries, canals and navigable rivers. *Olcott* v. *Supervisors*, 16 Wall. 678; *In re Debs*, 158 U. S. 564; *Monongahela N. Co.* v. *United States*, 148 U. S. 312; *Cherokee Nation* v. *So. Kansas R. R.*,

135 U. S. 641, 657; *L. S. & M. S. R. R.* v. *Ohio*, 173 U. S. 285; *Smyth* v. *Ames*, 169 U. S. 466; *Trunick* v. *Smith*, 63 Pa. St. 18; *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 39; *W. M. & P. R. R.* v. *Jacobson*, 179 U. S. 287, 296; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 696; *Mich. Tel. Co.* v. *City of Charlotte*, 93 Fed. Rep. 11. And taxes may be imposed for their construction and maintenance. *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 673; *Queensbury* v. *Culver*, 19 Wall. 83, 91; *People* v. *Flagg*, 46 N. Y. 401.

The primary purpose of every highway is public travel, traffic, commerce, communication. But the manner of use within the range of physical possibility is for the legislature to determine. It is because railroads are highways that Congress is empowered to establish them as post and military roads of the United States.

The power of Congress to establish the railroads of the United States as military and post roads is not a dormant power, but has been asserted and enforced by the Federal Government from the day the first railroad company was chartered. It has frequently been exercised as to railway bridges. 17 Stat. 99, 120, 160, 379. See also 5 Stat. 283; 10 Stat. 255; 12 Stat. 334; 14 Stat. 66; 17 Stat. 308, where in the case of such highways as the waters of the United States, canals and plank roads, Congress declares them to be post roads "during the time the mail is carried thereon." Is not the omission of this qualification in the case of railroads somewhat significant?

By the act of 1866, and correlated acts, Congress declared a policy and a purpose, that to encourage and facilitate intercommunication among the people, the companies operating the railroads and telegraphs of the United States should be mutually accommodating and coöperative, and should, so far as practicable, construct their lines of railroad and telegraph along the same rights of way. This policy is not only manifest from the title and context of the act of 1866, but from its history and the debates in Congress prior to its passage. This

policy has been discovered and declared by the courts, and numerous States have extended the policy by legislative enactment to include the telephone. Not only so, but through the dictates of self-interest and mutual accommodation, railroad and telegraph companies, from the earliest times, have under contract and agreement, operated side by side, so that today there is not, nor has there ever been, a railroad in the United States, over and along which telegraph lines have not been constructed, maintained and operated. Cong. Globe, Pt. IV, 1st Sess. 39th Cong., pp. 3480-3490; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1, 41, 49; *Tel. Co.* v. *Texas*, 105 U. S. 460; *Postal Tel. Cable Co.* v. *Oregon Short Line*, 114 Fed. Rep. 787; *Postal Tel. Cable Co.* v. *Southern Ry. Co.*, 89 Fed. Rep. 190; *Postal Tel. Cable Co.* v. *Oregon Short Line*, 65 Pac. Rep. 735; *West. Un. Tel. Co.* v. *B. & S. W. Ry. Co.*, 3 McCrary, 130; *West. Un. Tel. Co.* v. *B. & O. Tel. Co.*, 19 Fed. Rep. 660; *Southern Bell Tel. Co.* v. *Richmond*, 78 Fed. Rep. 858.

Not only so, but the statutes of many States extend the right to occupy the highways of the State, including the highways called railroads, to telephone companies—this court having limited the application of the act of July 24, 1866, to telegraph companies proper. *New Orleans, M. & T. R. R. Co.* v. *S. & A. T. Co.*, 53 Alabama, 211; Colorado: *Union Pac. R. Co.* v. *Colo. Postal Tel. Cable Co.*, 69 Pac. Rep. 564; Georgia: *S. F. & W. Ry. Co.* v. *Postal Tel. Co.*, 38 S. E. Rep. 353; Idaho: *Postal Tel. Co.* v. *O. St. Line Ry. Co.*, 104 Fed. Rep. 623; Illinois: *St. L. & C. R. R. Co.* v. *Postal Tel. Co.*, 173 Illinois, 508; Kentucky: *Postal Tel. Co.* v. *Mobile & O. R. Co.*, 54 S. W. Rep. 727; Louisiana: *Postal Tel. Co.* v. *M., L. & T. R. R. & S. S. Co.*, 21 So. Rep. 183; Mississippi: *Mobile & O. R. Co.* v. *Postal Tel. Co.*, 26 So. Rep. 370; North Carolina: *Phillips* v. *Postal Tel. Co.*, 41 S. E. Rep. 1022; Tennessee: *Mobile & O. Ry. Co.* v. *Postal Tel. Co.*, 41 L. R. A. 403; Texas: *T. & N. O. Ry. Co.* v. *Postal Tel. Co.*, 52 S. W. Rep. 108; Virginia: *Postal Tel. Co.* v. *Farmville & P. R. Co.*, 32 S. E. Rep. 468; Utah: *Postal*

Tel. Co. v. *Oregon Short Line*, 65 Pac. Rep. 735; Ohio: R. S. §§ 3454 *et seq.*

By the act of 1866, the Western Union Telegraph Company, having accepted its provisions, was in express terms granted, among other things, "the right to construct, maintain and operate lines of telegraph over and along" the railroads of the defendant railroad company, provided only that its lines be so constructed and maintained as not to interfere with the ordinary travel on the railroads.

The right granted to the Western Union Telegraph Company by the act of 1866, is simply of an easement of use, in an easement, yielding at all times to the necessities of the paramount use, and limited at all times to the non-interference with the primary uses of the railroad company.

A right granted in such manner is not unusual, see cases cited *supra*.

As to whether Congress, under its constitutional powers over the highways of the nation, as military and post roads, may appropriate the use of such post roads for the construction and operation of postal telegraph lines owned by it, or by one of its agencies, so long as the same shall not interfere with the ordinary travel on such military and post roads, without making compensation, either to the owners of the post roads or to the owners of reversionary interests therein, see *Pittsburgh & W. E. Pass. Ry.* v. *Point Bridge Co.*, 165 Pa. St. 37; *Stockton* v. *B. & N. Y. R. R. Co.*, 32 Fed. Rep. 9; *Scranton* v. *Wheeler*, 57 Fed. Rep. 803; *S. C.*, 179 U. S. 141, and authorities cited; *Hawkins Point Light House Case*, 39 Fed. Rep. 77; *S. C.*, 155 U. S. 102; *Gibson* v. *United States*, 166 U. S. 269; *Hewett* v. *W. U. Tel. Co.*, 4 Mackey, 424; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 324; *Hill* v. *United States*, 149 U. S. 593.

As to the public character of a railway, see act incorporating N. J. R. R. and Transportation Company, by the legislature of New Jersey, March 7, 1832; *Civil Rights Cases*, 109 U. S. 3; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, 296; *Lake*

Superior &c. R. R. Co., 93 U. S. 442; § 21 Penna. R. R. Co. Charter, Pamphlet Laws of Pennsylvania, 1846, p. 312; *Trunick* v. *Smith*, 63 Pa. St. 18; *People's Telephone* v. *President &c.*, 199 Pa. St. 411. For decisions *pro* and *con* as to whether a telegraph line is an additional servitude, see *Nichol* v. *Telegraph Co.*, 62 N. J. L. 733, as reported in 7 Am. Elec. Cas. 277, with note by Edw. Q. Keasbey.

If a telegraph company, accepting the obligations of the act of 1866, in attempting to avail itself of the rights and privileges granted it by said act in public and such *quasi*-public property as the military and post roads of the United States, finds it necessary to appropriate to its use private property involved with the public and *quasi*-public property, the grant made by Congress will not be declared void as transcending the constitutional powers of Congress, but the Constitution itself will be read into the act and the act interpreted in connection therewith and the courts will provide the court machinery necessary to determine judicially the amount of just compensation to be paid therefor.

The right to condemn may be exercised on the theory that an implied right has been granted. 10 Am. & Eng. Ency. of Law, 1054.

Statutes should be sustained rather than ignored. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Fenton* v. *Hampdon*, 11 Moore's P. C. 360; Sutherland's Statutory Construction, §§ 295, 324, 332, 340, 341, 343, 344, 379, 382, 388.

The constitutional inhibition against taking private property without just compensation, being negative, is self-executing, and is to be read into every law and statute where applicable. *In re Rugheimer*, 36 Fed. Rep. 369; *Hickman* v. *City of Kansas*, 41 Am. St. Rep. 684, and note; *West. Un. Tel. Co.* v. *Williams*, 8 L. R. A. 429. Compare *Neal* v. *Delaware*, 103 U. S. 370; *East St. Louis* v. *Amy*, 120 U. S. 600; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334. Where a right is given by law or statute, and no special machinery is provided for the enforcement of the law, the courts will supply the machinery,

either by adopting the machinery already in use or the machinery in vogue at common law, which, in cases of condemnation, was the writ *ad quod damnum*, which simply means that the amount of compensation to be paid to an owner for the appropriation of his private property to a public use shall be determined by a full jury. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Jones*, 109 U. S. 513; *High Bridge Co.* v. *United States*, 69 Fed. Rep. 320; *Boom Co.* v. *Patterson*, 98 U. S. 403; *Dashiell* v. *Grosvenor*, 66 Fed. Rep. 338; *New York* v. *Pine*, 185 U. S. 93; *Galway* v. *Elevated Ry. Co.*, 128 N. Y. 132; *Shepard* v. *Elevated R. R. Co.*, 117 N. Y. 442; *Osborne* v. *Mo. Pac. Ry. Co.*, 147 U. S. 248; *McElroy* v. *Kansas City*, 21 Fed. Rep. 357; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *St. Paul &c. Ry. Co.* v. *W. U. T. Co.*, 118 Fed. Rep. 497. As to the writ *ad quod damnum*, see 2 Lewis Em. Dom. § 402; *Scudder* v. *T. D. F. Co.*, 1 Sax. Ch. (N. J.) 694; *Hooker* v. *New Haven & N. Co.*, 14 Connecticut, 146; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Wheelock* v. *Young*, 4 Wend. 650; *Stevens* v. *Middlesex County*, 12 Massachusetts, 466; *Bloodgood* v. *M. & H. R. R. Co.*, 18 Wend. 9; *Beekman* v. *S. & S. R. R. Co.*, 3 Paige Ch. 45; *Upshur County* v. *Rich*, 135 U. S. 467, 476.

The act of 1866, necessarily implies that the beneficiary is vested with the power of eminent domain if, to avail itself of the rights granted, private property, incidentally involved with the specific property appropriated to its use, is also appropriated by it; otherwise the grant would fail. *Murphy* v. *Kingston &c. R. R. Co.*, 11 Ontario, 582, distinguished.

No case involving the principal issue herein has ever been presented to this court. The *Pensacola* case and the *Ann Arbor* case, on this point are not only clearly *obiter*, but by no means justify the significance attributed to them.

While the principal issue has never been presented to this court lesser courts have construed the act of 1866 according to the principles contended for by the petitioner. *Postal Tel.-Cable Co.* v. *Oregon Short Line*, 114 Fed. Rep. 787; *Postal*

Tel.-Cable Co. v. *Southern R. R. Co.*, 89 Fed. Rep. 190; *Postal Tel.-Cable Co.* v. *Oregon Short Line*, 65 Pac. Rep. 735; *St. P., M. & M. R. R. Co.* v. *W. U. Tel. Co.* (C. C. A.), 118 Fed. Rep. 497. Cf. *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 92; *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1, 41; *Southern Bell Telephone Co.* v. *Richmond*, 78 Fed. Rep. 858; *Union Trust Co.* v. *A., T. & S. F. R. R. Co.* (New Mex.), 43 Pac. Rep. 701; *Mercantile Trust Co.* v. *Atlantic & Pac. R. R. Co.*, 63 Fed. Rep. 513; *W. U. Tel. Co.* v. *Los Angeles Electric Co.*, 76 Fed. Rep. 178; but see *contra*, *Postal Telegraph-Cable Co.* v. *C., C., C. & St. L. R. R. Co.*, 94 Fed. Rep. 234.

As to the construction of the act of 1866 and the weight to be given to its title and the discussion attending its passage, see *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 559; *Price* v. *Forrest*, 173 U. S. 410, 427.

While to ascertain the meaning of an act, the mere discussion in Congress is not given special weight in some of the decisions of this court, yet reference is frequently made to reports of committees for the purpose of confirming the construction adopted by the court. *Hepburn* v. *Griswold*, 8 Wall. 610; *Untermeyer* v. *Freund*, 50 Fed. Rep. 80; *Nor. Pac. Ry. Co.* v. *United States*, 36 Fed. Rep. 285; *United States* v. *Union Pac. R. R. Co.*, 37 Fed. Rep. 554; *Austin* v. *United States*, 25 C. Cl. 454; *United States* v. *Burr*, 159 U. S. 85.

Mr. John G. Johnson for appellees and respondents in Nos. 89 and 199 and defendant in error in No. 90.

Power to enter upon a railroad right of way by a telegraph company is not conferred in Pennsylvania by any general or special statute of that Commonwealth. Nor is the Pennsylvania Railroad a public highway within the meaning of the act of 1866. *Nor. Cent. Ry. Co.* v. *Commonwealth*, 90 Pennsylvania, 305; *Telephone Co.* v. *Turnpike Road*, 199 Pennsylvania, 415. As to the status of the railroad company's title see *Junction Railroad Co.* v. *Philadelphia*, 88 Pennsylvania,

427; *P. & R. R. R. Co.* v. *Hummell*, 44 Pennsylvania, 375; *Schuylkill Valley R. R. Co.* v. *Reading Paper Mills*, 149 Pennsylvania, 18; *Philadelphia* v. *Ward*, 174 Pennsylvania, 45; *Railway Co.* v. *Peet*, 152 Pennsylvania, 488.

It is thoroughly well settled by the Pennsylvania decisions that a right of way, appropriated to a corporation for a *quasi*-public use, cannot be appropriated by another *quasi*-public corporation, for its uses, by implication. Under these decisions, an unrestricted general right to appropriate is construed as not including the power to seize the property of another corporation. *Penna. R. R. Co.'s Appeal*, 93 Pa. St. 150; *Pittsburgh Junction R. R. Co.'s Appeal*, 122 Pa. St. 511; *Sharon Railway Co.'s Appeal*, 122 Pa. St. 533; *Groff's Appeal*, 128 Pa. St. 621; *Market Co.* v. *Railroad Co.*, 142 Pa. St. 580; *Pittsburgh Junction R. R. Co.* v. *Alleghany R. R. Co.*, 146 Pa. St. 297; *Perry County R. R. Co.* v. *Railroad Co.*, 150 Pa. St. 193; *Penna. R. R. Co.* v. *Schuylkill Nav. Co.*, 167 Pa. St. 576; *Youghiogheny Bridge Co.* v. *Railroad Co.*, 201 Pa. St. 457. It has recently been held in Pennsylvania that the right of eminent domain does not exist in telegraph companies. *Penna. Telephone Co.* v. *Hoover*, 24 Pa. Super. Ct. 96.

If the Atlantic and Ohio Telegraph Company possessed the right of condemnation claimed by the appellant, such right was exercisable only under a petition by it presented, and the proceedings in Pennsylvania were defective for want of the proper parties. Act of 1871, P. L. 516; P. L. 1868, 1191.

Had the Atlantic and Ohio Telegraph Company been made petitioner in the condemnation proceedings the Circuit Court would have had no jurisdiction because of a lack of diverse citizenship.

No right is conferred upon telegraph companies by the act of 1866 to appropriate any portion of the right of way of railroad companies. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530. *United States* v.

Union Pac. Ry. Co., 160 U. S. 1; *St. Paul Railway Co.* v. *West. Un. Tel. Co.*, 118 Fed. Rep. 497, distinguished.

The Telegraph Company had no consent from the Railroad Company. The act of 1866 makes no provision for compensation and no procedure can be sustained under it. *Postal Tel. Cable Co.* v. *Cleveland Railway Co.*, 94 Fed. Rep. 234; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 90 Fed. Rep. 379.

The Railroad Company was entitled to the remedy given by its contract. If the Telegraph Company was entitled to appropriate part of its right of way, it was restricted, as were all other telegraph companies, to the right arising under such appropriation. It acquired no right before consummation of the condemnation proceedings, to an injunction against the enforcement of its contract.

As the Postal Telegraph-Cable Company had acquired a right antecedently to the alleged appropriation by the appellant, which rendered a location of additional wires and poles by the latter impossible, there was no right on the part of the latter to appropriate even if the act of 1866 allowed condemnation.

There was no waiver of the notice to remove given by the Railroad Company in May, 1902.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

By an act of Congress, approved July 7, 1838, and by subsequent acts, March 3, 1853, 10 Stat. 249, 255, c. 146; sec. 3964, Rev. Stat., June 8, 1872, 17 Stat. 283, railroads within the limits of the United States were made post routes or roads.

By act of March 1, 1884, it is provided "that all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." 23 Stat. 3, c. 9.

The act of 1866 is as follows, 14 Stat. 221, c. 230:

"*Be it enacted by the Senate and House of Representatives of*

the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams of waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel of such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may preëmpt and use such portion of the unoccupied public lands subject to preëmption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SEC. 2. *And be it further enacted*, That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"SEC. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascer-

tained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this act."

The construction of this act is the fundamental question in the case. The Telegraph Company contends that the necessary implication from the provisions of the act is that telegraph companies may enter and appropriate for their poles and lines a part of the rights of way of railroads *in invitum* upon paying just compensation. In other words, that the act invests telegraph companies with the right of eminent domain. The Railroad Company denies this construction, and asserts that the act gives the consent of the Government to telegraph companies to construct lines through its public domain and over and along its military and post roads, which are not the property of private corporations, and across navigable streams and waters. The act gives no right, the Railroad Company contends, to appropriate private property; but is an exercise by Congress of the national power over interstate commerce to secure telegraph companies from "hostile state legislation or contracts violative of an announced public policy." In other words, the contention of the Railroad Company is, that after the act of 1866 was passed, it "became impossible for the States, by any legislation, to exclude telegraph companies from the post roads." The contentions of the parties are opposed, therefore, only as to the degree of right conferred by the act. It is asserted by one party, and unqualifiedly admitted by the other, that Congress has power to grant the power of eminent domain to corporations organized for national purposes, and the arguments of the parties are addressed only to the considerations which serve to deter-

mine the intention of Congress. Both parties also claim authority for their respective contentions.

1. The act of 1866 came before this court for consideration over twenty-five years ago, in *Pensacola Telegraph Company* v. *Western Union Telegraph Co.*, 96 U. S. 1. The language of the court defining the rights conferred by the act has recently been repeated and sanctioned in *Western Union Telegraph Company* v. *Ann Arbor R. R. Co.*, 178 U. S. 239. In both cases the judgment of the court was adverse to the rights claimed under that act by the Telegraph Company in the case at bar. A review of those cases, therefore, and a consideration of the arguments directed against them and in support of them will constitute the most appropriate discussion of the questions now presented, and apply immediately to their solution the authority of this court.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, the legislature of Florida in 1866 granted to the Pensacola Telegraph Company "the sole and exclusive privilege and right" of maintaining and operating lines of telegraph through certain counties of the State. In 1872 the property of the Alabama and Florida Railroad Company was transferred to the Pensacola and Louisville Railroad Company. On the fourteenth of February, 1873, the legislature of Florida passed an act, which was amended in 1874, authorizing the last-named company to construct and maintain a telegraph line along its railroad, and to connect with lines in and out of the State. This was in the territory embraced by the exclusive grant to the Pensacola Telegraph Company.

On the twenty-fourth of June, 1874, the Pensacola and Louisville Railroad Company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right of way, and transferred to it all the rights and privileges conferred by the acts of February, 1873, and 1874. The Western Union Company immediately commenced the erection of the line, but before its completion the Pensacola Telegraph Company filed a bill to enjoin the work, on account

of the alleged exclusive right of that company under its charter. Upon the hearing a decree was passed dismissing the bill, and an appeal was taken to this court. The Western Union Telegraph Company had accepted the act of 1866, and claimed to erect and maintain a telegraph line under its agreement with the Pensacola and Louisville Railroad Company, and under the provisions of that act. The case, therefore, presented an issue between rights asserted under a statute of Florida and rights given and protected by the act of 1866. The issue was important. The act of 1866 was presented for the first time for interpretation and upon it depended not only the private rights of the contending companies but the more serious conflict of powers derived from the National and state governments. The questions, therefore, which bore on these issues called for, and, it is evident from the opinion of the court, received careful attention.

The first of these questions was whether the act of 1866 was a grant to telegraph companies of portions of the public domain and of rights in the public domain, or a grant of rights having a broader field of exercise—a grant of rights having operation and to be exercised throughout the whole of the United States. There was a marked difference in the rights contended for, and they depended upon different powers. In the public domain the Government was proprietor as well as sovereign, elsewhere only sovereign, and on its powers as sovereign there were limitations, arising not only from the rights of the States, but arising from the ownership of private property and the necessity of a grant of eminent domain to appropriate it. These limitations were of consequence in fixing exactly the rights conferred by the act of 1866, and were regarded by the court in its construction of that act.

The court declared, through Chief Justice Waite, that the act of 1866 was an exercise of the power of Congress over interstate commerce and the power to establish post offices and post roads, and, like other powers of the National Government, could be exercised "upon every foot of territory under

its jurisdiction." It was held, therefore, that the act was not a grant of rights only in the public domain, and the character of the rights was made unmistakable. The statute, the court said, "*in effect amounts to a prohibition of all state monopolies*" in commercial intercourse by telegraph. This is expressed more than once as the fundamental idea and sole purpose of the statute. The court further said: "It (the statute) substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, *so far as state interference is concerned*, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege. *To this extent*, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the power of Congress over the postal service.

And this construction, making the act of 1866 merely an exercise of national power to withdraw from state control or interference commercial intercourse by telegraph, is further emphasized in the opinion and the objections to it completely answered, which were based on the ownership of the post roads by individuals or corporations, and the necessity of implying a grant of the power of eminent domain to telegraph companies to appropriate them. The court said (p. 11):

"It [the act of 1866] gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business, but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And again (p. 12):

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language and the distinctions imported by it were approved in *Western Union Telegraph Company* v. *Ann Arbor Railroad Co.*, 178 U. S. 239. It was a bill in equity filed in the Circuit Court of Benzie County, Michigan, by a telegraph company against a railway company to restrain the latter from interfering with the rights of the telegraph company in a certain telegraph line along the right of way of the railroad. It was removed to the Circuit Court of the United States. The Circuit Court dismissed the bill, and its action was affirmed by the Circuit Court of Appeals. 33 C. C. A. 113. The Western Union Telegraph Company brought the case here. The decrees of both courts were reversed and the case remanded to the Circuit Court with directions to remand the case to the state court. This was decreed on the ground that, by the statement of the complainant's (telegraph company) own case, it was not brought "within the category of cases arising under the laws or Constitution of the United States." We said that the bill was in effect for the specific performance of a contract. "It is not argued," we said (p. 243), by the Chief Justice, "by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their busi-

ness; 'but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.' "

And further (p. 244): "As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction." In other words, by the decision in the *Pensacola* case no such Federal question remained to be based on the act of 1866.

Counsel, however, pronounce the extracts quoted from the *Pensacola* case and their repetition in the *Ann Arbor* case as *dicta*, and urge besides that the irresistible logic of other cases overthrows the authority of both. Neither proposition is tenable. We have said enough to demonstrate that the language we have quoted was the deliberate resolution of the court, and we might content ourselves by observing that, as the *Ann Arbor* case is the last expression of this court interpreting the act of 1866, prior cases, if not reconcilable with its exposition of that act, are superseded. We think they are so reconcilable.

One of the cases which is relied on, *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, asserted the very valuable right obtained by telegraph companies under the act of 1866, and vindicated it against a statute of Massachusetts, which provided for an injunction against the prosecution of business by the company as a means of enforcing the payment of taxes. This is the very essence of the effect given to the act of 1866 by the *Pensacola* and *Ann Arbor* cases. The telegraph company was in occupation of the post roads of the State of Massachusetts, whether railroads or the ordinary highways does not appear. Its right to be there was not controverted, and how it got there was of no consequence. Its right to do business after and during such occupation was

involved and was decided, and to this right the language of the court was addressed, and received limitation from it. The language of the court was substantially the same as that of the act of Congress. It enforced the right given by that act, and gave to the telegraph company the protection of the national power and supremacy, and differs only in the instance, not in the principle, declared in the *Pensacola* case. The telegraph company, indeed, sought for more than the mere exercise of a right. It sought to turn the act of 1866 from a mere permission to exercise a right to the creation of such an instrumentality of the National Government as to be exempt from state taxation. The court rejected that view.

So also must be limited the language in *Telegraph Company* v. *Texas*, 105 U. S. 460, and *United States* v. *Union Pacific Railway Co. & Western Union Telegraph Co.*, 160 U. S. 1. In the first the distinction which was necessary to make was between *intra* and *inter*state commerce, and to determine what rights as to the latter were conferred by the act of 1866. In the second case the efficacy of the act to prevent binding contracts against its policy was involved. The case called for that but no more, as far as the act of 1866 was concerned. Such an agreement was set up, and under it the Western Union Telegraph Company claimed the right to exclude all other telegraph companies from the roadway of the railway company, notwithstanding the act of 1866. Mr. Justice Harlan, speaking for the court, said (p. 42), that such an agreement "directly tended to make the act of July 24, 1866, ineffectual, and was, therefore, hostile to the object contemplated by Congress. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11."

We need not dissent from these views or qualify the general language by which they were amplified and supported. Whatever rights were granted by the act of 1866 were granted to all telegraph companies, and could not be defeated by a binding contract with some one company, nor could such an agreement be used to evade or escape the commands of the statute

constituting the Union Pacific Railway, passed in 1862, or the supplementary act of 1888, which was passed by virtue of a power reserved in the act of 1862. The suit was brought to enforce the duties and obligations imposed by those statutes on the railway company. The statutes are quoted in the opinion, and the act of 1866 is referred to only as reinforcing the provisions of the statute of 1862. It was only necessary, therefore, to declare the policy of the act of 1866 as a grant of rights to all telegraph companies. The consideration of the court was not directed to anything else. The extent of the rights granted as presented in the case at bar could not have been in contemplation. They were not in issue, and it could not have been intended to anticipate and decide the controversies which might be based upon them.

St. Louis v. *Western Union Telegraph Company*, 148 U. S. 92, is also urged by the Telegraph Company as inconsistent with the *Ann Arbor* case. It is clearly not so. The case involved the validity of a charge or rental made by the city of St. Louis for the use of its streets by the telegraph company. The charge was imposed by the same ordinance that gave permission to the telegraph company to occupy the streets of the city. The telegraph company resisted the charge upon several grounds, among which were the provisions of the act of 1866, and its acceptance by the company. The charge was held to be a valid one, but on no ground which involved the consideration of the right of the telegraph company to occupy the streets. The right was not disputed. The ordinance of the city conferred it. The claim made under the act of 1866 was that it exempted the telegraph company from a payment of any compensation. But compensation was decreed on the ground that the franchise or privilege granted by the act of 1866 could only be exercised in subordination to public as well as private rights, and, as entry upon the latter could only be made upon the payment of just compensation, entry upon the former was subject to the same payment. This was all that was necessary to decide to sustain the charge made by the

city. In other words, it was all that was necessary to decide to meet the extreme contention made by the telegraph company, that under the act of 1866 it was entitled to occupy the streets without charge, notwithstanding its occupation was exclusive and permanent, as the court said it was. It is manifest that to hold there can be no entry upon property without payment of compensation, is not to decide that such entry can be made upon tender of compensation. Certainly, as to private property or rights, the non-consent of the owner is a factor to be dealt with. Non-consent, if resolute, can only be overcome by power conferred by law; in other words, by the exercise of eminent domain. The act of 1866 was not considered in that regard.

By this review of the cases it is evident that there is no inconsistency between them and the *Pensacola* case and the *Ann Arbor* case, and we are brought to the discussion of the general considerations urged against the latter cases. Construed, as they construe the act of 1866, it becomes meaningless, counsel say. If the act grants no rights, it is urged, except by permission of the railroad companies, it confers no more than can be obtained from the railroad companies. The objection is best answered by examples. The telegraph company had such permission in the *Pensacola* case. It needed, however, the act of 1866 to make its exercise effectual against the legislation of the State of Florida. In the *Union Pacific* case a claim of a monopoly by one telegraph company was answered by the act construed as a grant of rights to all companies. These examples show important results achieved by the act, and the principles of the cases may come to be applied to prevent other hostile action of States or individuals.

This court, when it came to consider the act of 1866 in the *Pensacola* case, was confronted, as we are confronted now, with the serious nature of the right of eminent domain. It is indeed "inseparable from sovereignty," but it is accompanied and restrained by inexorable limitations. The property taken must be for a public use, and there must be com-

pensation made for it, and compensation, whether it be regarded as part of the power or a limitation upon the power, is so far essential that the absence of a provision for it has been regarded as important in determining the intention of the legislature when a grant of such power is claimed. 1 Lewis Eminent Domain, section 240, and cases cited. We said in *Sweet* v. *Rechel*, 159 U. S. 380, 399, by Mr. Justice Harlan: "It is a condition precedent to the exercise of such power (eminent domain) that the statute make provision for reasonable compensation to the owner." Many state cases were cited, and also (p. 402), *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641. The act of Congress under review in the latter case, it was contended, did not provide for compensation for the property taken. In reply, Mr. Justice Harlan, delivering the opinion of the court, said (p. 659): "The objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty." The requirements of the Constitution were held to be fully met because the act which was under consideration provided that before the railway which was authorized should be constructed through any of the lands proposed to be taken, full compensation should be made to the owner for all property taken, or damage done by reason of the construction of the road, and in the event of an appeal from the finding of the referee the railway company should pay into court double the amount of the award to abide the judgment.

In *Kohl et al.* v. *United States*, 91 U. S. 367, acts of Congress were considered, one providing for the acquisition of a site

for a public building, the other an appropriation act. The appropriation made by the latter was "for the purchase, at a private sale or by condemnation, of ground for a site" for the building. The real controversy in the case was whether the acts of Congress intended the site to be obtained under the authority of the state government in the exercise of its power of eminent domain or by the United States Government in its own right, and by virtue of its own eminent domain. The court held the latter, and, commenting on the sufficiency of the acts to give the right, said (p. 374): "The authority here given [the first act] was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. . . . That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation 'for the purchase at private sale or by condemnation of the ground for a site' for the building."

But in the act of July, 1866, there is not a word which provides for condemnation or compensation. The rule that when a right is given all the means of exercising it are given does not, as we have seen, apply to the extent contended for by the Telegraph Company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication, and this was the reasoning in the *Pensacola* case and applied directly to the act of 1866. We may repeat the language of the court: "If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

In *Sweet* v. *Rechel*, *Cherokee Nation* v. *Kansas Railway Co.*, and *Kohl* v. *United States*, all cited *supra*, the property to which the constitutional protection was applied was property in private use. Their doctrine applies as well to private property devoted to a public use. There is no difference whatever in principle arising from the difference in the uses.

A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico* v. *United States Trust Co.*, 172 U. S. 171. We there said (p. 183) that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property." And we drew support for this from a New Jersey case, in which State the rights of way in the case at bar are situated. We quoted *N. Y., Susquehanna & Western Railroad* v. *Trimmer*, 53 N. J. L. 1, 3, as follows: "'Unlike the use of a private way—that is, discontinuous—the use of land condemned by a railroad company is perpetual and continuous.'" And it is held in Pennsylvania "that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it." *Philadelphia & Reading Railroad Co.* v. *Hummell*, 44 Pa. St. 375. It is "a fee in the surface and so much beneath as may be necessary for support. . . . But whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature." *Pennsylvania Schuylkill Valley R. R. Co.* v. *Reading Paper Mills*, 149 Pa. St. 18; *Philadelphia* v. *Ward*, 174 Pa. St. 45; *Railway* v. *Peet*, 152 Pa. St. 488.

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power is, we said, in *Sweet* v. *Rechel*, that the statute conferring it make provision for reasonable compensation to the owner of the property taken. This condition is expressed

with even more emphasis in *Cherokee Nation* v. *Southern Kansas Ry. Co., supra.*

A few more words may be necessary to avoid all possible misunderstanding of the purpose for which we have cited those cases and *Kohl* v. *United States.* We have cited them, not as tests of the validity of the act of 1866, but as tests of its meaning, supporting the authority of the *Pensacola* case and *Ann Arbor* case. We have no occasion to consider the validity of the act of 1866 as an attempt to grant the power of eminent domain. We decide the act to be an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph. As such, of course, the act is an efficient and constitutional enactment.

Certain cases decided at circuit are cited for our consideration, and we will close this branch of our discussion by a brief review of them.

In *Postal Telegraph Cable Co. of Idaho* v. *Oregon Short Line Railroad Company,* 104 Fed. Rep. 623, and *Postal Telegraph Cable Company* v. *Oregon Short Line R. R. Co.,* 114 Fed. Rep. 787, there were views expressed favorable to the contentions made in the case at bar by the Telegraph Company, but the judgments in both cases were ultimately rested upon the local statutes—Idaho and Montana—which granted the right of eminent domain to telegraph companies. We may also observe that the first case went to the Circuit Court of Appeals of the Ninth Circuit. That court sustained the judgment of the Circuit Court upon the statute of Idaho and upon general legal principles. It did not refer to the act of 1866. 111 Fed. Rep. 842.

In *Postal Telegraph Cable Co.* v. *Southern Railway Co.,* 89 Fed. Rep. 190, and *Postal Telegraph Cable Co.* v. *Cleveland, C. & St. L. Ry. Co.,* 94 Fed. Rep. 234, the act of 1866 was more directly passed on. Both cases were proceedings in eminent domain—one brought in the courts of North Carolina and removed to the Circuit Court of the United States; the other brought in the Circuit Court of the United States for the

Northern District of Ohio. In passing on the sufficiency of the petition in the first case, Judge Simonton said that the right of petitioner to construct its lines along the right of way of post roads of the United States was given under the act of Congress of 1866, but, he observed, "the mode or method of exercising the right conferred was fixed by the laws of the several States, and it was exclusive in its character in ascertaining the amount of compensation to be allowed." The right of the Telegraph Company was, therefore, considered and adjudged under the North Carolina statutes.

In the second case a motion was made to dismiss on the ground that the power of eminent domain was not conferred by any law of the United States or the State of Ohio. The motion was sustained. District Judge Ricks said: "The act of July 24, 1866, made no provision for compensation or payment for property to be taken, hence the procedure cannot be sustained by virtue of that act." He cited the *Pensacola* case, *supra*.

The Western Union Telegraph Company v. *Ann Arbor R. R. Co.*, 33 C. C. A. 113, and *St. Paul M. & M. Ry. Co.* v. *Western Union Telegraph Co.*, 118 Fed. Rep. 497, were respectively decided by the Circuit Court of Appeals of the Sixth Circuit and the Circuit Court of Appeals of the Eighth Circuit. It is difficult to reconcile them. In one it was decided, following the authority of the *Pensacola* case, that the Telegraph Company could not occupy the line of the defendant's railroad without its consent or that of some predecessor in title. This was wanting. In the other, it was conceded that the right of entry upon private property was not conferred by the act of 1866, without the owner's consent, yet held that, as consent had been given, no reason could be perceived why a court of equity should compel a removal of the Telegraph Company's lines from the railway's right of way, "especially where it appears that *no express agreement was made that they should be removed when its lines were erected.*"

2. It is contended by the Telegraph Company that the charters under which the several railway companies constituting the system of the Railroad Company were organized expressly created them "public highways," and that in the acquisition of land for their purposes they were public agents, "and the land was taken by the Government, and in the eye of the law as completely subject to public uses as though it had been taken by the State itself"—that is to say, if we understand the argument, have become highways in the full sense of that word. And counsel further say the difference between them and ordinary highways "is not a legal difference, but is the difference of the kind of use to which the highway is subject—in the one case, wheel vehicles drawn by horses; in the other, to steam vehicles drawn by locomotives along and upon iron rails." They are subject, therefore, it is urged, as ordinary highways and streets of a city are subject, to the control of Congress by virtue of its power over interstate commerce.

Counsel in advancing the argument exhibit a consciousness of taking an extreme position. It would seem, certainly if considered with other parts of their argument, to make a railroad right of way public property. To that extreme we cannot go, for the reasons which we have already indicated. The right of way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control, and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation. The right of way of a railroad was recognized as private property in the *Pensacola* case, and we are brought back to the main question—the interpretation of the act of July, 1866, and upon that we have sufficiently dilated.

It follows from these views that the act of 1866 does not

grant the right to telegraph companies to enter upon and occupy the rights of way of railroad companies, except with the consent of the latter, or grant the power of eminent domain. Nor does the statute of New Jersey make those rights of way public property so as to subject them to such occupation under the provisions of the act of 1866.

It is admitted that the statutes of New Jersey do not confer the right of eminent domain upon the Telegraph Company.

3. In view of our conclusion, it is not necessary to consider the question whether, if the power of eminent domain were granted by the act of 1866, it would be within the competency of a court of equity to ascertain compensation, or that compensation might be determined at law. That question was pertinent in *Kohl et al* v. *United States*, 91 U. S. 367. It is not pertinent in this case. The acts of Congress passed on in *Kohl et al* v. *United States*, as we have seen, provided for the appropriation of a site for a public building by purchase or *by condemnation*. By the act of 1866 power of condemnation is not given, and, of course, methods of procedure are not involved in its construction.

It is equally unnecessary to consider the questions which might arise if the State of New Jersey gave the right of eminent domain to the Telegraph Company. It is conceded by counsel that such right does not exist, and it happens that under the policy of New Jersey the right of way of the Railroad Company enjoys in that State immunity from compulsory proceedings instituted by the Telegraph Company. But this has no bearing on the act of 1866, nor does it make that act, as construed by us, a grant to railroads of greater power over commercial intercourse by telegraph than the States have. Indeed, we think, a comparison between the States and railroads in that regard is misleading and overlooks the essential difference between restraints on the legislative power of the States and the rights of property.

On account of those restraints, it may be, and finding no

impediment in the rights of property, interstate commerce, by telegraph, has marched to a splendid development, although in the acquisition of the means for its exercise it has relied on the consent of the owner of private property, or the power of eminent domain conferred by the States. We cannot but feel, therefore, that there is something inadequate in the argument which is based on the apprehension that the act of July 24, 1866, construed, as we construe it, gives a sinister power to railroad companies. It gives no power to those companies but that which appertains to the ownership of their property.

Decree affirmed.

MR. JUSTICE BREWER concurred.[1]

MR. JUSTICE HARLAN, dissenting.

In view of the importance of these cases I do not feel that any dissent from the opinion and judgment of the court should be expressed, unless the grounds of such dissent be fully disclosed.

The controlling question before the court is, whether the Western Union Telegraph Company is entitled, in virtue of any existing acts of Congress, to keep and maintain its telegraph lines upon the right of way of the Pennsylvania Railroad Company, assuming that the ordinary travel on that road will not be thereby interfered with.

Congress, having power to establish post offices and post roads, has declared all railroads in operation within the limits of the United States to be Post Roads and Post Routes. 5 Stat. 271, 283, c. 172; 10 Stat. 249, 255, c. 146; Rev. Stat. § 3964; 23 Stat. 3, c. 9.

There was, for many years, as all know, and therefore as the court may judicially know, a widespread belief that the Government and the people of the country were at great disadvantage in matters of business and intercourse as involved

[1] For concurring opinion of MR. JUSTICE BREWER, see p. 593, *post*.

in the use of the telegraph. The conviction was strong and universal that the control of the post roads of the country was being exerted by great railroad corporations in such way as to subserve private and corporate interests at the expense of the United States and without any regard for the convenience of the general public. As a remedy for those evils Congress passed the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230. By that act Congress conferred upon any telegraph company organized under the laws of any State "the *right* to construct, maintain and operate lines of telegraph," not only through and over the public domain and over, under or across the navigable streams or waters of the United States, but "over and along *any* of the military or *post roads* of the United States." By the same act it is declared that on the lines of such companies telegraphic communications between the several departments of the Government should be at rates to be annually fixed by the Postmaster General, and have priority over all other business. § 2. To the exercise of the right thus given, Congress annexed several conditions, but the only one pertinent to the present discussion is the condition that the telegraph lines erected by any company accepting the provisions of the act should be so constructed and maintained as not to obstruct the navigation of the navigable streams and waters of the United States or "interfere with the ordinary travel on such military or post roads."

The object of the act, this court has said, all its members concurring, "was not only to promote and secure the interests of the Government, but to obtain, for the benefit of the people of the entire country, every advantage, in the matter of communication by telegraph, which might come from competition between corporations of different States;" that "it was very far from the intention of Congress, by any legislation, to so exert its power as to enable one telegraph corporation, Federal

or state, . . . to acquire exclusive rights over any post road;" and that "no railroad company, operating a post road of the United States, over which interstate commerce is carried on, can, consistently with the act of July 24, 1866, bind itself, by agreement, to exclude from its roadway any telegraph company, incorporated under the laws of a State, which accepts the provisions of that act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon." *United States* v. *Union Pacific Railway Company & Western Union Telegraph Company*, 160 U. S. 1, 44, 49. Yet, by its present construction of the act of 1866 the court—if we do not misapprehend its opinion—holds that the right which that act gives to construct, maintain and operate a telegraph line upon a post road cannot, in virtue of that act, or under any existing legislation, be exercised by the Western Union Telegraph Company, against the will of the railroad company operating such road; and this, notwithstanding it be absolutely clear that the occupancy of the post road by the telegraph lines of the particular company proposing or desiring to erect them would not, in the slightest degree, interfere with the ordinary travel on such road. It is now held, in effect, that, so far as that act is concerned, and despite its explicit provisions, even the Government cannot, except with the assent of the Railroad Company, enjoy the advantages sought to be secured by its passage. I think it was intended by the act of 1866, in the interest of the postal service and of interstate trade and intercourse, to throw open all the post roads of the country to the use of telegraph companies accepting its provisions, subject to the condition that such use should not interfere with ordinary travel on the post roads so occupied. And that intention is in harmony with the doctrine often announced by this court, that "a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control." *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 657; *Olcott* v. *Supervisors*, 16

Wall. 678, 694; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287.

But it is suggested that the Telegraph Company has not been expressly invested with the power of eminent domain. Nevertheless, it has been given, by express words, the *right* to construct, maintain and operate its lines on any *post road* of the United States; and as it is not contended that Congress has exceeded its power in granting that right the question is whether the right so given can be made effective by any mode of procedure known to our jurisprudence. I have always supposed it to be competent for a court of the United States, having general jurisdiction of suits at law and in equity, in some efficient mode, by some process or form of procedure, to enforce and protect any right constitutionally conferred by the legislative department. The principle is illustrated in *Osborne* v. *Missouri Pacific Railway Company*, 147 U. S. 248, which was an action to enjoin the construction of a track along a public street, because of irreparable damage to be thereby inflicted on the plaintiff. This court, following the decision of Judge Brewer, now of this court, in *McElroy* v. *Kansas City*, 21 Fed. Rep. 257, said (p. 249): "If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainants substantial benefit of the condition, while not restraining defendant from the exercise of his ultimate rights. Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of property for public use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted, with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which complainant would

sustain, upon payment of which the injunction would be vacated." This principle was recognized in the recent case of *New York City* v. *Pine*, 185 U. S. 93.

It is said by counsel that the right given by the act of 1866 is necessarily subject to the condition prescribed by the constitutional provision that private property shall not be taken for public use without just compensation, and that the property interest of the Railroad Company in its right of way cannot be permanently taken from it for public purposes, against its will, without making such compensation.

Upon the subject of compensation the court reproduces from the opinion in *Sweet* v. *Rechel*, 159 U. S. 380, 399, this detached sentence: "It is a condition precedent to the exercise of such power [eminent domain] that the statute make provision for reasonable compensation to the owner." But the court does not apply any such rule to the present case and holds that the act of 1866 is invalid *as not making provision for compensation*. Besides, the above sentence taken in connection with the one immediately preceding it shows clearly that what was said had reference to the taking of *private* property for public use without provision being made in the statute for compensation. The entire paragraph from which the above sentence was taken reads: "When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of the Government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." What was said in *Sweet* v. *Rechel* plainly had no reference to property of a public or *quasi*-public nature. The same observations may be made in reference to the quotation made from *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. What was said in that case had also reference to the taking of private property. If the court were now of opinion that the act of 1866 was invalid *as*

not making provision for compensation, then the object of citing *Sweet* v. *Rechel* and *Cherokee Nation* v. *Kansas Railway* would be both manifest and appropriate. But the court does not hold that the act of 1866 is objectionable on any such ground. On the contrary, it holds a railroad right of way to be private property, and yet, despite its citation of the above cases, recognizes the validity of the act, although it makes no provision for compensation to the owner. It may not be appropriate for me to say that I adhere to what was said in *Sweet* v. *Rechel* and *Cherokee Nation* v. *Southern Kansas Ry. Co.*, the opinions in both of which cases were written by myself, speaking for the court. Whether a railroad right of way over a post road of the United States—such road being a public highway established primarily for the public convenience and subject to governmental control—is private property within the rule that a statute authorizing private property to be taken for public use must make provision for compensation, is a question not wholly free from doubt, and it need not be here discussed; for, the court does not hold that the act of 1866 is subject to that objection.

But let it be granted, for the purposes of this case, that a railroad company has such a property interest in its right of way that it is entitled to compensation, if such right of way be appropriated to the use of a telegraph company, accepting the act of 1866; still, the question remains in what way or by what mode may such compensation be legally ascertained? May it not be ascertained by a court of general jurisdiction, when all parties in interest are regularly being brought in? Here the Telegraph Company comes into the Circuit Court of the United States and seeks, in virtue of the act of Congress, to enforce the right expressly granted to it of occupying the post road in question with its lines. It expresses its readiness to make such compensation to the Railroad Company as the law requires, and informs the court that it has instituted an action at law to ascertain the amount of such compensation. The bill alleges:

"Your orator says further that it is diligently prosecuting said action on the law side of this court for the ascertainment of the amount of compensation to the said railway companies defendant herein, for the right to the use of said railroads to maintain and operate its telegraph line along and over the lines of said railways as prescribed in said act of Congress of July 24, 1866; and that it will continue to prosecute the same to a final determination as rapidly as the business in said court will permit the said cause to he heard and determined and without any unnecessary delay.

"Your orator prays that this court ascertain, order, adjudge and decree the amount of compensation to be paid by your orator to the defendants, as their rights may severally appear, for the construction, maintenance and operation of your orator's telegraph lines over and along the right of way of the defendants' said railroads, under the terms, provisions and restrictions of said acts of Congress hereinbefore mentioned, or, if this court shall order and determine that the amount of such compensation to the defendants shall be such amount as shall be determined or adjudged in the said action at law, that upon due payment of such compensation by your orator to the defendants this court will order, adjudge and decree that your orator is entitled to a perpetual injunction against the defendants herein and each of them, restraining them and each of them from in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendants, under and subject to the provisions and restrictions of the said act of Congress of July 24, 1866, and meanwhile and until the final decree of this court that a temporary injunction be issued against the defendants, prohibiting and restraining them and each of them from in any manner interfering with the use and operation of the telegraph lines of your orator upon the said roadway and right of way of the defendants pending the determination of the said action at law, or until the further order of this court in the premises.

And for such other and further relief as the case may require and to your honors may seem just."

Kohl v. *United States*, 91 U. S. 367, was an application filed in pursuance of acts of Congress authorizing and directing the Secretary of the Treasury to purchase a site for a public building. A site was selected, but the Secretary and private owners could not agree as to price, and the acts of Congress did not direct the particular mode by which the land should be condemned and the compensation to be made by the Government ascertained. The Secretary of the Treasury, in order to carry out the will of Congress, did not institute formal proceedings of condemnation as one of the acts, under which he proceeded, authorized him to do. But he instituted a suit in a Circuit Court of the United States to appropriate a certain parcel of land for the proposed building. It was objected that the Circuit Court was without jurisdiction, but that objection was overruled. It was contended in argument that while the United States had the right of eminent domain, Congress had not given to the Circuit Court jurisdiction of a proceeding for the condemnation of property brought by the United States in the assertion or enforcement of that right; and that the act of Congress meant that the land for the proposed public building was to be obtained under the authority of the state government in the exercise of its right of eminent domain. It was further contended that if the proceeding was properly instituted in the Circuit Court, then the act of Congress required that it should conform to the provisions of the state law in a like proceeding in the state court. This court said (p. 375): "Doubtless Congress might have provided the mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. *The investment of the*

Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him *also* the power to obtain it *by any means that were competent to adjudge a condemnation* (p. 376). . . It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi-judicial*. Certainly no other mode than a judicial trial has been provided. . . . *But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law;* and hence, as the Government is a suitor for the property *under a claim of legal right to take it*, there appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit, *under the general grant of jurisdiction made by the act of* 1789."

In *United States* v. *Jones*, 109 U. S. 513, which was a proceeding to condemn property for the use of the United States, this court, referring to a certain proposition advanced by counsel, said (pp. 518, 519): "There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom Company* v. *Patterson*, 98 U. S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. . . . But there is no reason why the compensation to be made may not be ascertained *by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the*

appropriating power. The proceeding for the ascertainment of the value of the property and consequent compensation to be made, *is merely an inquisition to establish a particular fact as a preliminary to the actual taking;* and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is *that it shall be conducted in some fair and just manner,* with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon."

The vital object of the present suit was to secure the recognition and enforcement of the right of the Telegraph Company, under the act of 1866, to keep and maintain its lines upon the railroad's right of way. If it had such right—the authority to confer the right is, we repeat, not disputed—then this suit in equity was an appropriate mode by which the right could be adequately protected and compensation secured to the railroad company. To assert the right and to ask that the amount of compensation shall be ascertained made the proceeding a suit or controversy within the meaning of the judiciary acts, and made the case one—in legal effect—for condemnation. I perceive no reason why the court, in advance of a final decree recognizing and enforcing that right, could not have instituted, as it was asked to do, an inquiry in respect of the compensation which the Railroad Company was entitled to receive for the proposed use of its right of way, and have made the payment of such compensation a condition precedent to the exercise by the Telegraph Company of the right given by the act of 1866. Having all the parties interested before it, could not the court have directed a jury to be impanelled to inquire, under the direction of the court, as to the amount of compensation to be paid to the Railroad Company? Could it have done any more under regular proceedings of condemnation? Instead of adopting that course, the Circuit Court proceeded upon the ground that even if the use of the defendant's road by the Telegraph Company would not interfere with ordinary travel on and

over it, it was compelled by the former decisions of this court to hold that neither in virtue of the act of 1866, nor of any other exising Federal statute, could the Telegraph Company occupy the railroad's right of way without the consent of the Railroad Company.

The cases in this court which, it is supposed, adopted this view of the act of 1866 are *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, and *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243. But the utmost ingenuity is inadequate to show that the present question was involved in either of those cases, or that the decision in either case depended in the slightest degree on its solution.

It appears from the *Pensacola* case that the Western Union Telegraph Company had the right to place and operate its lines upon the right of way of a certain railroad company between points in Alabama and points in Florida. There was no controversy in that case between the railroad company and the telegraph company as to the right of the latter to have its lines on the railroad right of way. The railroad company, as the report of the case shows, had consented to the occupancy of its right of way by the lines of the Telegraph Company, and that fact was not disputed. The railroad company was not even a party to the suit. It had no quarrel with the telegraph company. What need, then, had the court to consider the rights of the Western Union Telegraph Company, under the act of 1866, when it was conceded that that company had the consent of the railroad company to occupy its right of way? This view of the case was distinctly announced by this court when it said in the *Pensacola* case that "*the present case is satisfied, if we find* that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its [the telegraph's] usefulness." The sole question in the case was as to the validity of a Florida statute, under which a Florida telegraph company was given *exclusive* telegraphic rights over the route to be occupied by the Western Union Telegraph Company with the consent of the railroad

company; and the charter of the Florida company authorized it to locate and construct its lines within certain named counties of Florida "along and upon any public road or highway, or across any water, or upon any railroad or private property for which permission shall have first been obtained from the proprietors thereof." This court held that the attempt of the State to exercise exclusive control over telegraphic communications between it and other States was in conflict with the commerce clause of the Constitution of the United States, and that the Florida statute was void, so far as it assumed to grant exclusive privileges to a particular telegraph company.

Referring to the act of 1866 the court said (p. 11): "It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if *they accept the terms proposed by the National Government for this national privilege.* To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." What was meant by the words, "but it [the act] does provide that, whenever the consent of the owner is obtained," I cannot understand. The act of 1866 does not contain any such provision nor anything like it. Not a single word is to be found in it

that refers to the consent of the owner of the property to be taken. The court proceeds: "It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, 'Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military *and post roads*, and the navigable waters of the United States. These are all within the dominion of the National Government to the extent of the national powers, and are, therefore, subject to legitimate Congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of *public* property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language, it seems to me, has not been correctly interpreted. Undue stress has been laid upon the words "private property without the consent of the owner," and the words "private property . . . obtained by private arrangement with its owner." They have been so interpreted as to make the court decide a question not before it, not necessary to the decision, not involved in the isuses made, and never suggested by counsel. The briefs of counsel in that case show that no such question was in their minds; for they as well as the court knew, from the record before them, and as we may know from an examination of that record, that the Western Union Com-

pany was entitled, so far as the consent of the railroad company was concerned, to maintain its lines on the railroad right of way. Upon the above quoted words the contention is based that the court intended to decide that no railroad right of way could, *in virtue of the act of* 1866, be occupied by any telegraph company without the consent of the railroad company first obtained. I cannot believe that any such question was intended to be decided. As already shown, the court expressly said that the only question to be decided was whether Congress had power to prevent a State from obstructing interstate telegraphic communications, by granting exclusive privileges to a particular telegraph company of its own creation. It is a mistake to say that the court declared that the *sole* purpose of the act of 1866 was to prevent state monopolies, or that the act was merely an exercise of national power to forbid state interference with telegraphic communications. It did say that the case then before the court would be satisfied if the question as to state interference was decided, that is, that the case involved no other question. Besides, the whole context of the opinion in the *Pensacola* case shows that the court did not include railroad property employed in commerce when it used the above quoted words. It was argued in that case that the act of 1866 had reference only to the "public domain," that is, to the public lands owned by the United States. This view was distinctly rejected, and post roads were placed by the court, so far as the privileges granted by the act were concerned, on the same plane as the public domain, so that not even a State could interfere with the national privilege granted by Congress, if the telegraph company accepted the terms of the act. The court said that any telegraph company, accepting the provisions of the act, could put its lines on any post road, if ordinary travel thereon was not interfered with, and that not even the State could stand in the way. It then added, as if out of abundant caution, and to show that Congress had no purpose to interfere with the rights of private owners, that no attempt was made by Congress to provide for

the appropriation of private property, and that "the use of *public* property *alone* is granted." That meant that the act had not granted any right to telegraph companies to occupy *private* property with telegraph lines. Having said that the act granted the use of post roads for telegraphic purposes; that it embraced the use of such roads *equally* with the public domain; and that "the use of *public* property *alone* is granted," it is inconceivable that the court employed in the same connection the words "private property," as embracing post roads, or the use of such roads. To relieve the minds of those who apprehended danger arising from the act of 1866 to state sovereignty and to rights that were strictly private, the court took care to say that neither state sovereignty nor private rights were interfered with; that only national privileges were granted; but that, in respect of the use of the public domain and military and *post roads*, Congress had power to pass the act of 1866, and in dealing with the use of post roads, by telegraph companies, it dealt with public property.

When the court held in the *Pensacola* case that telegraphic communications between the States could be regulated by Congress under its power to regulate commerce, and that the statute of Florida, which assumed to give to a Florida telegraph company an exclusive right in respect of telegraphic communications over certain territory in that State, was inconsistent with the act of 1866, that was an end of that case, and nothing remained to be done, except to dismiss the suit. The court itself so declared. Nothing more was in issue between the parties. The case involved, I confidently insist, no question as to the previous assent of the railroad company being a condition of the exercise by the Western Union Telegraph Company, of the rights given by the act of 1866.

Nor is the case of *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243, 244, an authority for the action of the Circuit Court. That was a case in which the only relief sought was the *specific performance* of a contract under which a telegraph company claimed the right to remain in the occupancy

of the right of way of a railroad company. The court pertinently observed in that case that it was not claimed that "the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property." It was, however, claimed that as the telegraph company was in the discharge of public duties, the Circuit Court "should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement, to be ascertained by the court." But that view was rejected because the bill "was not framed in that aspect," and so as to protect the occupancy of the telegraph company subject to the condition of its making compensation, and the court also said that the relief asked could not be given under the prayer for general relief, because not "agreeable to the case made by the bill."

Now, the present bill has been framed so that the court can protect the right given to the Telegraph Company by the act of 1866 to have its wires and poles on the company's right of way, upon its being ascertained that such use will not interfere with the ordinary travel on the railroad, just compensation being made for that use, and the amount of compensation to be ascertained by the court in some appropriate way.

In my judgment, nothing involved or in judgment in the *Pensacola* and *Ann Arbor* cases requires the affirmance of the decree of the Circuit Court.

The affirmance of that decree of the Circuit Court will mean that the efforts of Congress, by the act of 1866, to obtain for the people of the country the advantages accruing from competition between corporations of the different States in the matter of telegraphic communications, and also to promote and secure the interests of the Government as involved in the conduct of its postal and military business, will prove of but little value. Indeed, as construed, it might have been better for the country if the act of 1866 had not been passed, and the States left free to establish such regulations in refer-

ence to telegraphic communications, within and over its territory, as would be appropriate and valid in the absence of Congressional legislation on the subject. As the matter now stands, the whole subject is practically committed to the railroad companies. The court says that the act of 1866 is an efficient enactment for the purpose of preventing state interference with interstate telegraphic communications. As now construed, it would seem to be most efficient in tying the hands of the States and leaving railroad companies operating post roads, so far as existing legislation is concerned, absolute masters of interstate communication by telegraph.

In the *Pensacola* case it was decided, and I think rightly, that in respect at least, of interstate telegraphic communications, a State could not give exclusive privileges to a particular telegraph company. But, as just stated, by the necessary operation of the judgment now rendered a railroad company, operating a post road, can, in effect or practically, confer exclusive privileges upon a particular telegraph company, in respect of its right of way, by simply withholding its consent for a second telegraph company to occupy any part of such right of way with its wires and poles. If the Government should be of opinion that the public business imperatively required another telegraph line upon the post road now occupied by the Pennsylvania Railroad, that company need only object to other telegraph lines being placed upon its right of way, and that will be the end of the matter, so far as the act of 1866, as now construed, is concerned. If the Government, and a telegraph company fully equipped, should jointly represent to the railroad company that an additional company can be admitted to its right of way without obstructing the ordinary travel on that road, the company need only reply that no other telegraph company than the one now there can occupy its right of way, and that will be the end of the matter, so far as the act of 1866, as now construed, is concerned. All this is now made possible, notwithstanding the decision of this court in *United States* v. *Union Pacific Rail-*

way, 160 U. S. 1, above cited. In that case we propounded this question, p. 44: "Can it be said that after the passage of the act of 1866, and while it was in force, a railway company, operating a post road of the United States, could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provisions of that act?" We said that this question could be answered only in one way, "namely, that every railroad company operating a post road in the United States, over which commerce among the States is carried on, was inhibited, after the act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operations." The court added that it was very far from the intention of Congress by any legislation to so exert its power as to enable one telegraph corporation, Federal or state, to acquire exclusive rights over any post road. But now, a railroad corporation operating a post road, and wishing its right of way occupied only by a single company, with which it may have a special business arrangement, for its own purposes, need not make even a secret agreement granting exclusive privileges to that company. It need only keep silence and withhold its assent to the occupancy of its right of way by another company, and in that way give exclusive privileges to the company with which it has a special arrangement; it may be to one organized wholly in the interest of the railroad company. In the *Pensacola* case it was said that one of the objects of the act of 1866 was to prevent state monopolies in telegraphic communication, and that the privilege granted by that act was a national privilege. Now, although state monopolies cannot exist, railroad monopolies in telegraphic communications may exist; and the national privilege granted by the act of 1866 is left at the mercy of railroad companies operating the post roads of the United States.

Practically, the railroad corporations operating post roads —looking to their own interests and perhaps caring little for the general welfare—are recognized as now having more power

than a State. I cannot assent to any interpretation of the act of 1866 from which such a result can follow. No such result is, in my opinion, consistent either with the words of the act or with the objects which Congress, as this court has said, intended to accomplish by its passage. The act, reasonably interpreted, was, I think, intended to give a telegraph company accepting its provisions the absolute right to put its wires and poles upon any post road—a public highway established primarily for the public convenience—if the ordinary travel on such road was not thereby interfered with.

For these reasons, I am constrained to dissent from the opinion and judgment of the court.

MR. JUSTICE BREWER, concurring.

I concur in the judgments in these cases but do so distinctly on the ground that the questions have been settled in prior cases. If the matter was *res integra* the views expressed by Mr. Justice Harlan would be very persuasive. *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1, and *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239, seem to me controlling. In the first of these cases, the scope of the power and authority granted by the act of 1866 was distinctly presented. It was within the proper limits of inquiry, and the opinion of the court shows that it was fully considered. The declarations in that opinion are clear and precise, and cannot be considered in any just sense *obiter dicta*. The decision was announced in 1877, and was reaffirmed in 1890 in the *Ann Arbor* case. If the court erred in its construction of the act, Congress has had twenty-seven years in which to correct the mistake. Its omission to take any action must be considered as an acquiescence on its part in that construction. And I am of the opinion that when this court has construed a statute of Congress, and that construction has remained for more than a

quarter of a century, neither changed by any judicial decisions or set aside by any Congressional legislation, it ought not to be disturbed except for the most cogent reasons.

WESTERN UNION TELEGRAPH COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 90. Argued October 19, 20, 1904.—Decided December 12, 1904.

Western Union Tel. Co. v. *Pennsylvania R. R. Co. et al, ante*, p. 540 followed to effect that the act of July 24, 1866, 14 Stat. 221, does not confer any right of eminent domain on telegraph companies and that a railroad company's right of way is not a public highway within the meaning of that act.

Eminent domain cannot be delegated, and the lessee of a corporation cannot exercise the power of condemnation conferred by legislature on the lessor.

THE facts are stated in the opinion.

Mr. John F. Dillon, Mr. Rush Taggart and *Mr. Henry D. Estabrook* for plaintiff in error as to the special points involved in No. 90.[1]

The Atlantic and Ohio Telegraph Company was authorized by its charter to appropriate to its use, within specified limitations, property of a specific character, to wit, the roads, highways, streets and waters of the State of Pennsylvania. Defendant's railroad is not only a highway of the State in its very nature, but by its charter and the constitution of Pennsylvania is expressly declared to be a highway. Hence, it is subject to the appropriation of the Atlantic and Ohio Telegraph Company, within the limitations of the right granted. § 1, art. 17; §§ 3, 12, art. 16, constitution Pennsylvania; cl. 1, § 33, and cl. 2, ch. 6, act of Pennsylvania legislature, April 29, 1874; *Trunnick* v. *Smith*, 63 Pa. St. 18.

[1] For abstract of argument on other questions involved in this case, see *ante*, p. 547.

As lessee of the franchises of the Atlantic and Ohio Telegraph Company, the Western Union Telegraph Company has the right in its own name to exercise such franchises, including the franchise of eminent domain.

This was practically conceded by the trial judge, who held, however, that the Atlantic and Ohio Telegraph Company was not authorized under its charter to appropriate to its use a railroad right of way, even within the limitations imposed—to wit, that the use should not interfere with the common use of such highway, or incommode the public use thereof.

Not only would the Western Union Telegraph Company have the right to condemn in its own name, under the express terms of the Atlantic and Ohio charter already quoted, but it would have the right under the general principles and policy of law, which justifies the condemnation only upon the theory that the property when condemned is for the use of the public, by whomsoever condemned, and that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. *Abbott* v. *N. Y. & New England R. R. Co.* (Mass.), 15 N. E. Rep. 91; *Cal. Cent. Ry. Co.* v. *Hooper*, 76 California, 404; *Crolley* v. *Minn. & St. Louis R. R. Co.*, 30 Minnesota, 541; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Illinois, 156; *Kip* v. *N. Y. & Harlem R. R. Co.*, 6 Hun, 24; *S. C.*, 67 N. Y. 227.

Mr. John G. Johnson for defendant in error.[1]

Mr. Justice McKenna delivered the opinion of the court.

This was a petition on the law side of the Circuit Court for the Western District of Pennsylvania to condemn part of the defendant's right of way and appropriate it to telegraph purposes. There was also a bill on the equity side praying for an injunction to restrain defendant in error from dispossessing

[1] For abstract of argument in this case, see *ante*., p. 555.

plaintiff in error during the pending of the condemnation proceedings.

The Circuit Court refused to approve the bond tendered with the petition for condemnation and ordered the petition dismissed. 120 Fed. Rep. 362. The Circuit Court of Appeals affirmed that action. 123 Fed. Rep. 33.

The bill in equity, though not before us technically, has been freely referred to in argument, and, besides, many of the allegations of the petition are the same as those in the bill and appeal passed on in Nos. 89 and 199. The same rights are asserted under the act of July 24, 1866, as there considered. The contention here, as there, is that the Telegraph Company has the right to maintain its lines of telegraph over and along the railroads of the Railroad Company upon making compensation to the Railroad Company for the use so appropriated, so long as the maintenance of its telegraph lines does not materially interfere with the ordinary travel of such roads, and that the right can be asserted by proceedings in eminent domain. It is conceded that there is no general law of Pennsylvania giving that right to the Telegraph Company. The contention that such right is given by the act of 1866 we considered in Nos. 89 and 199, and decided against the contention. But there are other elements in this case. The Telegraph Company is the lessee of the Atlantic and Ohio Telegraph Company (the lease is terminable at the option of either party by giving six months' notice) and claims eminent domain as successor of that company. The claim rests upon the statute of Pennsylvania incorporating the Atlantic and Ohio Telegraph Company. That statute was passed in 1849, and provided, in section five, that it should be lawful for the company "to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this State; the said works to be so placed as not to interfere with the common use of such roads, highways, streets and waters." The company was authorized to enter into and occupy any land for the purposes of locating and

constructing its lines upon securing or tendering such compensation as might be agreed on between it and the owners of the land, or in the manner mentioned in the statute. The Circuit Court and the Circuit Court of Appeals rejected the claim of the Telegraph Company based on that act. The decision was rested on two grounds: (1) That railroads were not highways within the meaning of the statute; and (2) as expressed in the opinion of the Circuit Court of Appeals: "No authority to enter upon the right of way of railroads was plainly and distinctly granted, and it is well settled that the right of eminent domain may be exercised by a corporation, in any case, only when granted in express terms or by necessary implication, and that property held and applied by one corporation for a public use cannot be appropriated by another for its use without authority clearly expressed, or which may be implied from the fact (which in this case does not exist) that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. *Penna. R. R. Co.'s App.*, 93 Pa. St. 150; *Pittsburg Junction R. R. Co.'s App.*, 122 Pa. St. 511; *Sharon Ry. Co.'s App.*, 122 Pa. St. 533; *Groff's App.*, 128 Pa. St. 621; *Perry Co. R. R.* v. *N. & S. V. R. R. Co.*, 150 Pa. St. 193; *Phillips* v. *D., W. & P. R. R. Co.*, 78 Pa. St. 177; *Glover* v. *Boston*, 14 Gray, 282."

(1) In the opinion in Nos. 89 and 199 we marked a distinction between highways and railroads against a contention which identified them in legal meaning and effect. We need not enlarge upon what we there said. Highways and railroads may be assimilated in legal contemplation to a certain extent, and considerations which apply to one within that extent apply to the other. To apply them beyond that extent would be to confound the distinctions of common speech and practice and destroy property rights long recognized to exist. And we do not deem it necessary to follow and answer in detail the very able arguments of counsel. It is enough to say that they have carried the analogies between ordinary high-

ways and railroads too far; indeed, have gone beyond analogy, and have contended for almost legal coincidence in attributes and effect.

(2) But there is another rule applicable to grants of eminent domain which is also fatal to the contention of the Telegraph Company for the rights claimed by the Telegraph Company under the lease from the Atlantic and Ohio Telegraph Company. Eminent domain cannot be delegated. Lessees cannot exercise it. 1 Lewis Eminent Domain, section 243, and cases cited. It is to meet this prohibition probably that certain allegations of the petition are made. It is alleged that the Atlantic and Ohio Telegraph Company entered into a "contract to lease" with the Telegraph Company the first of April, 1864; that afterwards the former company made an agreement with the Railroad Company whereby the latter company granted to the said Atlantic and Ohio Telegraph Company permission to construct and maintain a line of telegraph wires "along and adjacent to the line of railroad" from Philadelphia to Pittsburgh, "without limit as to term and duration," which contract was afterwards assigned to the Telegraph Company (plaintiff in error), and the assignment was ratified and affirmed by the act of the legislature of Pennsylvania, entitled: "An act supplemental to an act entitled 'An act to incorporate the Atlantic and Ohio Telegraph Company, approved March 24, 1849, and to confirm certain agreements executed by said company,'" approved May three, one thousand eight hundred and seventy-one, the same as if the said lease and contract had been made by virtue of express authority of law, the said act of assembly also providing that said Atlantic and Ohio Telegraph Company should have and possess all the rights, powers and privileges conferred by the third and fourth sections of the act of the legislature of Pennsylvania to incorporate the Eastern Telegraph Company, approved the fifth day of April, 1866.

This act, the petition alleged, gave to the Telegraph Company "all the corporate rights, powers, privileges and fran-

chises of said Atlantic and Ohio Telegraph Company, including the right to appropriate, on inability to agree with the owner, all lands necessary for the construction, maintenance and operation of the said lines of telegraph from Philadelphia to Pittsburgh, with any and all such branches therefrom as it may think proper."

The acts cited affirmed agreements or leases theretofore made. Subsequent agreements were provided for, if at all, by sections 3 and 4 of the act incorporating the Eastern Telegraph Company, as follows:

"SEC. 3. That the said corporation shall have power to connect by contract, with other persons or corporations having other telegraphic lines within or out of this State, for the purpose aforesaid; and it may also form a union with or lease to other corporations, associations or individuals, incorporated by this Commonwealth or any other State, its own lines, with their fixtures and apparatus, or lease from any individuals, associations or corporations incorporated by this Commonwealth, or any other State, their lines, fixtures and apparatus, and when such unions as aforesaid are formed the stock may form a common stock upon such terms and conditions as the said companies or associations respectively shall agree upon, and that as soon as such union shall be effected and a true copy of the agreement made for that purpose, duly certified under the corporate seal of the said companies, shall have been filed in the office of the secretary of the Commonwealth, the stockholders of the said companies shall become one body, corporate and politic, under such name and style as they shall adopt and agree upon and embody in their certificate, with all the rights and privileges incident to a corporation and with all the rights, powers and privileges which, by virtue of this act, are vested in the company hereby incorporated.

"SEC. 4. That the said corporation shall have power to purchase, make, use and maintain any connecting or side lines."

Under those sections the Atlantic and Ohio Telegraph Com-

pany was authorized to lease its lines to the Telegraph Company. A lease had already been made, as we have seen. Those sections also authorized the companies to "form a union" and "become a body corporate and politic, under such name and style" as they should adopt. That was not done. The Telegraph Company, therefore, is the simple lessee of the Atlantic and Ohio Company, and has only the powers of a lessee, and as such cannot exercise the right of eminent domain conferred on the Atlantic and Ohio Company.

It is, however, further alleged that the Telegraph Company, by the power vested in it by the lease from the Atlantic and Ohio Company and the acts of the Pennsylvania legislature confirming the same, and "in the exercise of all and every other power enabling it in anywise to do so," duly located a single line of telegraph along and upon the right of way of the Railroad Company and attempted to agree with the latter company upon the prices of compensation therefor; and "that the aforesaid corporate action of the Western Union Telegraph Company has been duly ratified and approved by corporate action in that behalf by the said Atlantic and Ohio Telegraph Company."

It will be observed that the location, so called, was made by the Telegraph Company and in its own name. It was not made by the Atlantic and Ohio Company and in its name. And the Atlantic and Ohio Company is not a party to this action. The action was commenced and is prosecuted by the Telegraph Company alone. The prayer is that, upon the payment of the compensation which shall be directed to be paid for the "rights and interests acquired thereby (that is, by the statutes and proceedings set out in the petition) by the said Western Union Telegraph Company, possession be adjudged to the Western Union Telegraph Company by this court of the said use, right and interests according to law, and that the title to the said rights and interests as against the defendant thereby vest in the said Western Union Telegraph Company for the purposes aforesaid; . . ."

If it can be said that under the allegations of the petition the Atlantic and Ohio Company retains its rights as the lessor of the Telegraph Company, still as to such rights it is a necessary party. To have made it a party might have precluded jurisdiction in the Circuit Court.

But the Telegraph Company contends for eminent domain in its own right as lessee of the Atlantic and Ohio Telegraph Company, and in its own name, and combats the view that it cannot receive a delegation of that power. The following cases are relied on: *California Central Ry. Co.* v. *Hooper*, 76 California, 404; *Crolley* v. *Minneapolis & St. Louis Ry. Co.*, 30 Minnesota, 541; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Illinois, 156; *Kip* v. *N. Y. & Harlem R. R. Co.*, 6 Hun, 24; aff'd, 67 N. Y. 227; *Abbott* v. *N. Y. & N. E. R. R. Co.*, 145 Massachusetts, 450.

These cases do not sustain the contention. In the case in 76 Calfornia a corporation commenced proceedings in eminent domain. It afterwards consolidated with other corporations. The new corporation thus created was held to be entitled to continue the proceedings in its own name and for its benefit, because it had acquired that right in the manner provided by the statutes of the State.

In 30 Minnesota a railroad corporation condemned, paid for and took certain land for its right of way. Without constructing its road, it transferred the right of way to another railroad corporation. The owner of the land taken brought ejectment for it, alleging the invalidity of the transfer. It was held that his interests were not affected by the transfer, and he could not question the capacity of the first company to make, nor the second company to receive, the transfer.

In 113 Illinois the facts are somewhat complicated, but the point decided relevant to our present discussion is, that it mattered not that the necessity for an increase of a right of way of a railroad company for additional tracks was caused by the use of the road by other companies acting under lease or by contract, nor by what company or companies the road

was operated. It was still a public use, and (to quote the court) "the needs of the lessees are as those of the lessor company, and any condemnation for their wants may proceed in such latter company's name, and it all the while stands responsible for the running of the road." *Kip v. N. Y. & H. R. Co.*, 6 Hun, 24; *S. C.*, 67 N. Y. 227, were cited.

If this case supports one contention of the Telegraph Company, it destroys another. It establishes that if the right of eminent domain is given to the Telegraph Company by the lease from the Atlantic and Ohio Telegraph Company that right can only be exercised in the name of the latter company. And such is also the effect of the cited cases, or rather the cited case, for it is only one case appearing at different stages in the reports. The plaintiff in the case, who was appellant in the Court of Appeals (67 N. Y. 227), brought suit against the defendant company to restrain it from prosecuting proceedings to condemn certain lands owned by him in the city of New York. He had leased them to the company for twenty-one years, and his contention was that the condemnation proceedings would impair the obligation of the lease and should be enjoined.

The plaintiff alleged also a lease by the defendant of its road and property to the New York Central and Hudson River Railroad Company for 401 years, and claimed that the lease abrogated the proceedings to condemn the land, and terminated and removed all necessity for its acquisition for the use of the defendant. It was held (1) that the relation created by the lease was no impediment to the exercise of eminent domain conferred upon the company by the statute of the State; and (2) that the proceedings to condemn were not affected by the lease. The court observed that the same necessity existed in favor of the defendant after as before the lease, and if the necessity was only in favor of the lessee it was competent for "the lessee to continue the proceedings *in the name of the defendant.*" (Italics ours.)

In *Abbott* v. *N. Y. & N. E. R. R. Co.*, the question involved was whether the power to take land by eminent domain may be given to a foreign corporation, and whether a corporation by the consent of the legislature may take the power as a *quasi* successor of another corporation to which it was originally granted. Under the statutes of the State those questions were answered in the affirmative, and it was in regard to those questions and statutes that Chief Justice Holmes, now a justice of this court, said that the reasons which have led some courts and judges to doubt the necessity of the consent of the legislature to a transfer of the right of eminent domain from one corporation to another "show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred." The case is not like that at bar, and need not be further analyzed.

A case more applicable to the case at bar is *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R. R. Co.*, 109 Massachusetts, 103. In that case the railroad company was required to unite with others in establishing a passenger station. Resisting the proceedings which were brought to appoint commissioners to select a location, it was urged that it might become necessary to exercise the right of eminent domain, and against that the railroad pleaded a lease to the Boston, Hartford and Erie Railroad Company, which had been confirmed by the legislature. There were other transfers of interests, and of them and the lease the court said: "Yet none of these leases or assignments can be construed to extend to the lessees or assignees the power to exercise the right of eminent domain, or to restrict the right of the legislature to alter or repeal the charters." And again: "The lease by the Norwich and Worcester Railroad Company did not make the lessees, or their representatives, parties to the grant of power to exercise the right of eminent domain. The right remained in the original corporation, and the legislature might properly deal with it exclusively in amending their (its) charter."

Judgment affirmed.

MR. JUSTICE HARLAN, dissenting.

The judgment of the Circuit Court in this case rests mainly upon the same grounds as the judgment in cases Nos. 89 and 199. For the reasons stated in my opinion in those cases, I dissent from the opinion and judgment in this case.

Ex parte THE REPUBLIC OF COLOMBIA.

IN THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR WRIT OF MANDAMUS TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

No. 13, Original. Argued November 28, 1904.—Decided December 12, 1904.

Nothing in the decree of this court in *Colombia* v. *Cauca Co.*, 190 U. S. 524, prohibits the Circuit Court from allowing interest on the amount of the items allowed.

THE facts are stated in the opinion.

Mr. William G. Johnson for the Republic of Colombia, petitioner.

Mr. John W. Beaumont, with whom *Mr. Hugh L. Bond, Jr.*, and *Mr. J. Walter Lord* were on the brief, for the Cauca Company, respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of mandamus to the Circuit Court, ordering it to correct its decree entered in pursuance of the decision in *Colombia* v. *Cauca Company*, 190 U. S. 524.

The decree appealed from in that case confirmed an award against the Republic of Colombia after rejecting certain items, and ordered interest to be paid on the remainder from January 26, 1898, the date fixed for payment by the award. In this court other items of the award were disallowed and a decree was made reversing the decree below and remanding the case, "with directions to enter a decree confirming the award for and up to the sum of $193,204.02." The Circuit Court thereupon entered a decree for that sum, with interest from the above mentioned date. The giving of interest is the error alleged, and it is contended that by the proper construction of the decree of this court interest should not have been allowed.

Of course, the only question open in this proceeding is, whether the decree of this court prohibits the allowance of interest. *Re Sanford Fork & Tool Co.*, 160 U. S. 247. As to that it is to be noticed that nothing is said upon the subject either in the decree or in the discussion of the case. In the opinion, however, the items were treated as separate matters; "some of which," it was said, "may be disallowed without affecting the rest." The only ground suggested for reversal was the inclusion of the separable items. By confirming the award as to the others this court in effect declared that they should have been paid in gold coin of the United States of America, in the city of New York, on January 26, 1898, in accordance with the terms of the award. To that extent the decree below stood approved, and as no disapproval was expressed of the consequence attached by that decree to the failure to pay, it is impossible to say that there was any implied prohibition of again attaching the same consequence in the new decree. "The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects." *Gaines* v. *Rugg*, 148 U. S. 228, 238. This language is sufficiently applicable to be